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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 578

HELMS BAKERIES, a corporation,

Petitioner, and Appellee Below,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, R. E. COLLINS, GEORGE R. REILLY, HARRY B. RILEY, FRED E. STEWART and WILLIAM G. BONELLI, individually and as members of the State Board of Equalization of the State of California,

Respondents and Appellants Below.

Petition for Writ of Certiorari to the Supreme Court of the State of California and the District Court of Appeal of the State of California and Brief in Support Thereof.

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Parker & Baird Company, Law Printers, Los Angeles

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vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, R. E. COLLINS, GEORGE R. REILLY, HARRY B. RILEY, FRED E. STEWART and WILLIAM G. BONELLI, individually and as members of the State Board of Equalization of the State of California,

Respondents and Appellants Below.

Petition for Writ of Certiorari to the Supreme Court of the State of California and the District Court of Appeal of the State of California.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, HELMS BAKERIES, a corporation, respectfully shows:

I.

Summary Statement of the Matters Involved.

The petitioner, HELMS BAKERIES, a California corporation, prays that a writ of certiorari be issued by the Supreme Court of the United States to review a decision of the District Court of Appeal of the State of California, First Appellate District, Division 2, together with the action of the Supreme Court of the State of California, refusing a hearing after decision by the District Court of Appeal.

The above entitled action was in equity for an injunction. It was filed by HELMS BAKERIES, a corporation, hereinafter referred to as the "Bakery", against the State Board of Equalization of the State of California and its members, for an injunction to permanently enjoin a threatened cancellation of a California Retail Sales Tax Permit held by HELMS BAKERIES under the California Retail Sales Tax Act of 1933, as amended. (Cal. Stats. 1933, p. 2599, as amended; Act 8493, Deering's Gen. Laws.)

The Bakery received a temporary injunction prior to the trial and after trial by the Court without a jury, was awarded a judgment making the injunction permanent. From that judgment the Board and its members appealed to the California Supreme Court within the time provided by law and filed an opening brief [Rec. p. 61]. The Bakery filed a respondent's brief in the Supreme Court and the appellant filed a closing brief. The matter was then transferred by the Supreme Court for considera-

tion to the District Court of Appeal, First Appellate District, Division 2 [Rec. p. 61]. That court thereafter wrote a decision reversing the trial court. This decision was dated July 15, 1942 [Rec. p. 78]. Thereafter within the time provided, a petition for hearing in the California Supreme Court was filed by the Bakery. An answer to the petition was filed by the Attorney General of California, representing the Board and its members, and on September 10, 1942, an order was made by the California Supreme Court, refusing to grant a hearing in the Supreme Court. The Bakery, as petitioner, thereafter and within the three-month period, asked a review by this Court.

Morse v. U. S., 270 U. S. 151, 70 Law. Ed. 518.

The plaintiff below operates a large bakery and was and is the holder of an essential Retail Sales Tax Permit from the State of California. The State Board of Equalization threatened to revoke this permit contending as a basis for so doing, that while all other payments due from HELMS BAKERIES had been paid, it had failed to pay the 2½% tax on certain bakery goods sold during the period from October 1, 1934 to and including June 30, 1935. The findings show no delinquency on the part of the Bakery but an overpayment over $20,000.00 [Rec. pp. 4, 16] The Bakery contended, and still contends, that any such forfeiture is in violation of the constitutional rights of the petitioning corporation.

After the trial of the action which was partly on a stipulation of facts [Rec. pp. 54 and 57], and partly on

testimony [Rep. Tr. pp. 31 and 44], the Court made findings of fact and conclusions of law upholding the position throughout of plaintiff Bakery. The complaint referred to in the findings is found in the record at pages 1-9. The findings are found in the record at pages 16-19 and incorporate pages 1-9, and many of the facts are admitted by the answer. Briefly, the undisputed facts are: The plaintiff operates a bakery plant with annual gross sales of over $2,700,000.00 employing approximately 500 employees. It supplies more than 370 routemen with food products and other items for resale to consumers within the state of California. It has contracts for the purchase of raw materials and has on hand raw materials subject to deterioration. It is and has been a seller, not only of edibles, but also of other tangible personal property, for which latter a permit is still required. During the period from October 1, 1934, to and including June 30, 1935 (on which date the 2½% Retail Sales Tax on *food* was eliminated by the Amendment of 1935 to the Retail Sales Tax Act), plaintiff, at wholesale, sold food products to more than 200 routemen who resold such food products at retail to ultimate consumers, on the salesmen's own behalf and account. The Board contended that these were retail sales by HELMS BAKERIES, and that the goods were not sold by HELMS BAKERIES at wholesale to the routemen who were independent merchants. The trial court found that the routemen were independent contractors and made the retail sales themselves to the ultimate consumers, hence HELMS BAKERIES was not liable for the sales tax thereon.

Also it had overpaid the State by mistake, some $27,000.00. The correctness of these findings is not questioned in the decision of the District Court of Appeal.

The amendments of the year 1935 to the Retail Sales Tax Act were and are known as Chapters 335 and 357 of the 1935 Statutes of California. These amendments exempted from the provision of the Act and from the computation of the amount of tax levied, assessed or payable under the Act, the gross receipts from the sale of food products for human consumption. There was no "saving" clause. The Bakery pleaded [Rec. p. 4] that after July 1, 1935, the State Board of Equalization was without any jurisdiction, power or authority to levy, assess or collect any sales tax based on computed or any gross receipts derived from any sale of food products for human consumption, and the trial court found this to be true [Rec. p. 18].

In 1938, the Board proceeded to assess against HELMS BAKERIES, the alleged additional tax on foodstuffs sold by the routemen between October 1, 1934, and June 30, 1935. Neither evidence nor pleading indicate any previous demand or knowledge. The Bakery refused to pay after hearings were held at the request of the Bakery before the Board, as provided by law, but the purported assessment was nevertheless levied by the State Board of Equalization. No legal action, however, was filed by the Board to collect. Instead, on or about May 20, 1940, the Board purported to give notice in writing to the Bakery to appear and show cause why the Bakery's permit,

AX-1887 should not be revoked. The Bakery appeared and was advised that the Board was going to revoke their Retail Sales Tax Permit, and that the basis of the revocation was the failure to pay the 2½% sales tax amounting to $6,572.28, based upon the tax not paid by the routemen on their retail sales of edible food during the period from October 1, 1934, to and including June 30, 1935. This is admitted by failure to answer paragraph XII of the complaint [Rec. pp. 13, 14]. The Bakery contended that even though there is no longer a tax on edible goods sold at retail for human consumption, a sales tax permit is necessary in connection with its other sales, and there was testimony to this effect which was not controverted. The trial court determined that a sales tax permit was proved to be necessary [Rec. p. 8]. However, the District Court of Appeal in its decision [Rec. p. 83], takes the position that the proof was insufficient to show great and irreparable injury entitling the Bakery to an injunction. The Bakery further contended, and the trial court found the contentions to be true, that: 1. The State Board of Equalization was without jurisdiction to revoke any retail sales tax permit except for failure to comply with the provisions of the Retail Sales Tax Act, or the rules and regulations of the State Board of Equalization, and that at no time since June 30, 1935, or at any time, has the plaintiff failed to comply with the provisions of the Retail Sales Tax Act, or any of the rules and regulations of the State Board of Equalization prescribed or adopted under such Act [Rec. pp. 8, 16, 17]. The opinion of the District Court of Appeal does not disturb this finding.

II.

Reasons Relied on for the Allowance of the Writ.

1. The Supreme Court of the United States has jurisdiction and should issue the writ, under Title 28, paragraph 344 of the U. S. C. A. (Jud. Code, Sec. 237, as amended). The court here has to consider a final judgment or decree in the highest court of the state of California in which a decision in the suit could be had in, which decision and in which case there is drawn into question: First, the validity of a statute (the Cal. Retail Sales Tax Act of 1933, as amended) on the ground of its being repugnant to the Constitution, and wherein the decision of the court of last resort in California is in favor of the statute's validity, and second, the title, right, privilege, or immunity which is specially set up or claimed by applicant under the Constitution [for mention in Decision, see Rec. p. 85, and for mention in Petition for Hearing, see Rec. pp. 63-64].

In addition to the general jurisdictional rights of the Supreme Court of the United States to take jurisdiction as set forth in paragraph I of this subdivision of the petition, for reasons hereinafter stated the Supreme Court should take jurisdiction to protect the rights of the petitioner under the United States Constitution. The state courts have decided federal questions of substance not theretofore determined by this court and in ways not in accord with the decisions of the United States Supreme Court.

An examination of the record discloses that certain constitutional rights were claimed by the petitioner as plaintiff in the original action. The pleading of constitutional rights included the following allegations: (1) The Bakery had paid into the State Treasurer erroneously, as sales tax not due from it because it was not a retailer of the goods involved in the sales tax, $27,963.46 [Rec. p. 4], (this is found to be true and is not overthrown by the opinion of the District Court of Appeal); (2) The state claims that the Bakery owes $6,572.28 for the period from October 1st, 1934 to and including June 30th, 1935, when the tax on foodstuff ceased to be in effect because of repeal without a "saving" clause; (3) No part of the $6,572.28 is due to the Board from the Bakery under the findings of fact and conclusions of law of the trial court for a variety of reasons: (a) the repealing statute has no "saving" clause giving the Board the right to collect; (b) there was never due any sum under any cirumstances, as the Bakery was not a retailer but a wholesaler so far as the alleged tax are concerned, and there are offsets greater than the amount claimed; (c) the Statute of Limitations has run on any action by the Board to collect; (d) the Statute of Limi- has run as to any penalty for failure to pay [Rec. p. 6]; (4) The sales tax permit of the Bakery has a value to it and is needed for its business [Rec. p. 7, 8]; (5) The action is not one to restrain the collection of the tax; (6) nor to prevent an action being brought by the Board to try to collect the tax.

The Supreme Court has the power to review the decision of the state court as its decision is based on infringement of a constitutional right and "search the record in the state court in order to see that no constitutional freedom is defeated by insubstantial findings of fact

screening reality." (*Milkwagon Drivers Union v. Meadowmoor Dairies,* 312 U. S. 287, 85 Law. Ed., p. 836.) The issues in an injunction proceeding raising questions of the applicability of a state statute regulating business or affecting the validity of a tax may be reviewed by the United States Supreme Court.

Nashville, etc. v. Wallace, Treasurer, 288 U. S. 249, 261-2, 77 Law. Ed. 731, 735;

Pierce v. Society of Jesus, etc., 268 U. S. 510, 69 Law. Ed. 1070;

Risty v. Great Northern, 270 U. S. 378, 70 Law. Ed. 641;

Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 71 Law. Ed. 303.

2. A corporation has a right to a livlihood and HELMS BAKERIES, a corporation, has such a right, which the evidence shows would be taken away from it by forfeiture of its retail sales tax permit [Rec. pp. 7, 8].

Pierce v. Society of Jesus, supra.

3. The District Court of Appeal in its decision has no right in view of the stipulation of the parties and the findings of fact which were not challenged on appeal, to waive these findings aside and say that it considered the evidence insufficient. The United States Supreme Court has jurisdiction and it is its duty to protect rights to do business.

Terrace v. Thompson, 263 U. S. 197, 68 Law. Ed. 255;

Pierce v. Society of Jesus, supra.

Were the decision in this case to stand, the Board of Equalization and any similar Board without statutory

authority may, without any period of limitation, forfeit any permit to do business for any reason it deems advisable. No injunction would lie. This would be unconstitutional and contrary to decided California law.

Hughson, etc., v. State Board of Equalization, 23 Cal. App. (2d) 281, 3;

Laisne v. California State Board of Optometry, 19 Cal. (2d) 831.

4. The District Court of Appeal was in error when it held that petitioner could pay the money into the State Treasury and recover it back, inasmuch as the statute to which it refers limits this right to sixty days [Rec. p. 31]; and said time expired early in 1935, without any notice whatsoever to petitioner that any money would be claimed. Due process imports a court, notice and an opportunity to be heard.

Hurtado v. Peo. of California, 110 U. S. 51, P. 28 L. ed. 232, 238-9.

5. The State Board of Equalization is not under the statute or the California Constitution, a judicial body. (*Laisne v. Cal. State Board, etc., supra.*) It appears from the record that a court with jurisdiction has determined that there was not any tax liability on the part of the petitioner. The California Retail Sales Tax Act of 1933, as amended, gave no judicial power and could give none to the State Board of Equalization to determine that there had been a violation and therefore to forfeit the sales tax permit for such alleged violation of the statute or rules and regulations. Where no constitutional judicial authority exists to determine facts, and a Board arrogates to itself the authority to determine

such facts (as distinguished from forfeiting a permit after there has been a judicial determination by a court or body with authority to determine the liability), such a Board's decision is arbitrary and a violation of the constitutional rights of the party whose permit is to be forfeited.

Laisne v. California State Board of Optometry, supra.

6. It makes no difference whether the case arises under one form of pleading or another. The form of pleading is immaterial.

Nashville etc. Railway v. Wallens, Comptroller of the State of Tenn., 288 U. S. 249, 77 Law. Ed. 730;

Ex parte Williams as Tax Commissioner, 277 U. S. 267, 272, 72 Law. Ed. 877, 879;

Fidelity & Deposit Co. of Maryland v. Tafoya, Chairman of the State Corporation Commission of New Mexico, et al., 270 U. S. 426, 434-5, 70 Law. Ed. 664, 667;

Home Tel. & Tel. Co. v. City of Los Angeles, 227 U. S. 278, 57 Law. Ed. 510.

Wherefore, your petitioner, HELMS BAKERIES, a corporation, prays that a writ of certiorari issue under the seal of the Supreme Court of the United States of America directed to the Supreme Court of the State of California and the District Court of Appeal of the State of California, in and for the Second Appellate District, Division 2 thereof, commanding said courts to certify and send to this Court a full and complete transcript of the records and of the proceedings of the said California

courts had in the case numbered and entitled upon their dockets as "Supreme Court L. A. No. 17990; District Court of Appeal, First Appellate District, Division 2, Civil No. 11992; Supreme Court of California, 1 Civil, No. 11992, Helms Bakeries, a corporation, plaintiff and respondent, v. State Board of Equalization of the State of California, *et al.*, defendants and appellants," to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment and the decision herein of the said District Court of Appeal, be reversed by the Court and that this Court award such other and further relief as to the Court may seem proper.

Dated this 8th day of December, 1942.

DAVID R. FARIES,
Counsel for Petitioner.

C. E. McDOWELL and
McINTYRE FARIES,
Of Counsel.

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Respondents and Appellants Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Courts Below.

The opinion of the District Court of Appeal of the State of California, First Appellate District, Division 2, is found on pages 78-85 of the record as printed under the direction of the clerk of this Court. It is reported in 53 Advance Cal. App. Reps. 490, the Supreme Court of the State of California denied a hearing (one justice voting for a hearing) without any written opinion.

II.

Jurisdiction.

1. The date of the decision of the District Court of Appeal was July 15, 1942. Under Section 3 of Rule 30 of the Rules of the Supreme and District Courts of Appeal of the State of California, application for an order that a cause be heard and determined by the Supreme Court must be accompanied by a copy of the opinion of the District Court of Appeal and must be served and filed on the adverse party with proof of service within forty days after the date of the decision by the District Court of Appeal. This was done, application having been served and filed on the 23rd day of August, 1942. [Rec. p. 62.] The Supreme Court denied the hearing on September 10, 1942 [Rec. p. 86], four days prior to the time that jurisdiction to act expired. Petition is made to this Court prior to the expiration of the three-month period as provided for by Title 28, Subdivision 350, U. S. C. A., and Sec. 8 of Act of February 13, 1925.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28, Sec. 344, U. S. C. A. Subdivisions (a) and (b) (Jud. Code, Sec. 237, as amended by the Act of February 13, 1925; also Act of March 8, 1934, and Rules of Practice and Procedure, including particularly Rule 38 of the Supreme Court of the United States.)

3. The nature of the case and the rulings of the Court below were and are such as to bring the case within the jurisdictional provisions relied on, in that there is drawn into question the validity of a statute of the State of California on the ground of its being repugnant to the Constitution, and the decision of the trial court was in favor

of validity; also, this Court has jurisdiction in that the decision of the District Court of Appeal rendered pursuant to assignment by the highest court in the State of California and passed later on by the Supreme Court of the State of California (by refusing a hearing after judgment in the District Court of Appeal), is repugnant to the Constitution of the United States; also this Court has jurisdiction in that "title, right, privilege, or immunity is specially set up and claimed by the present petitoner under the constitution."

This case was for an injunction to prevent a threatened forfeiture of a retail sales tax permit issued under the California Retail Sales Tax Act (Cal. Statutes of 1933, p. 2599, as amended). [Rec. p. 9.] The complaint, answer and findings all show that plaintiff had a large investment, numerous employees, did business and required a retail sales tax permit, which was property. [Rec. pp. 1-9.] The Board admittedly planned, in May, 1940, to forfeit the Bakery's permit. [Rec. pp. 6-7.] The threat of cancellation was not qualified by any statement or offer that the permit would be returned or a new permit granted in the event the money was paid. The undisputed findings show that no tax was due or owing from the Bakery, and there had been an overpayment in excess of $21,000.00. The Board's only ground for the alleged forfeiture was that it claimed that a tax was owed for the period from October 1, 1934, to and including June 30, 1935, on food sold to routemen who resold it to the consumers at retail. There was no judgment to this effect. The California Retail Sales Tax Act provided (Sec. 30 thereof) for collection by suit. This remedy had a three-year period of limitations and no suit was brought thereon. The petitioner's suit for injunction against forfeiture of

the permit was filed in July, 1940, or five years after the alleged tax became delinquent. [Rec. p. 1.] The statute was amended in 1935, without any "saving" clause, eliminating all tax on edible foods sold at retail. This Act, as amended, stated:

> "Sec. 5. There are hereby specifically exempted from the provisions *of this act* and from the computation of the amount of tax levied, assessed or payable *under this act* the following:
>
> * * * * * * * * *
>
> (e) The gross receipts from the sale of good products for human consumption. 'Food products' as used herein includes cereals and cereal products, milk and milk products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and sale, sugar and sugar products other than candy and confectionery, coffee and coffee substitutes, tea, cocoa and cocoa products other than candy and confectionery."

The trial court found that no right to forfeiture of the permit existed and granted the injunction. [Rec. p 20-21.] The District Court of Appeal disregarded in its decision:

(a) That a provision of the same statute as permits forfeiture of the permit provides for a proceeding to collect the alleged tax and that by the 1933 Act it had to be brought in 2 years and by the 1935 Amendment it must be brought within three years of delinquency;

(b) The fact that no right to recover any taxes existed in view of the action of the Legislature in repealing the law without a "saving" clause;

(c) That the evidence shows that it was admitted by the State that the Bakery had a large and substantial in-

vestment on which many people depended for their livihood and for foodstuffs, and the margin was such that it could not continue to operate without a sales tax permit covering retail sales of non-edibles to ultimate consumers;

(d) That the Bakery would suffer great and irreparable injury; [Rec. p. 18.]

(e) That the Bakery owed no money to the Board. [Rec. p. 18.]

The District Court of Appeal without overthrowing any of the foregoing findings, except to state that in its opinion the great and irreparable injury was not proved (in so doing it invaded the provence of the trial court since there was substantiating evidence which was uncontested), assumed, without authority therefor

(a) That the forfeiture of the permit was a permitted proceedings for the collection of a non-adjudicated tax [Rec. pp. 78, 79, 81];

(b) That payment under protest and an action to recover back was an adequate remedy at law for the forfeiture of a permit, though such would not restore a permit [Rec. p. 79].

It neglected to consider that great and irreparable injury would occur in the meanwhile while such an action could be brought, adjudicated and recovery obtained (assuming that a permit in some way could be again obtained.) [Rec. p. 84.]

In the complaint it is pleaded and found to be true that there has been an overpayment by the Bakery to the State Board of Equalization of $27,963.46. This is set up in paragraph VII of the complaint [Rec. p. 4] and found to be true. [Rec. p. 16.] Therefore, assuming,

but not conceding that the $6,572.28 is due, this should be offset. In balancing one against the other, there is still an overpayment on the part of HELMS BAKERIES in excess of $21,000. No ground for any forfeiture exists therefor under the admitted facts of this case, and the opinion of the District Court of Appeal is based solely on (1) disregard of proven and admitted facts, and (2) the assumption of a state of facts which does not exist, and (3) an attempt to apply inapplicable authorities to such a fictitious and unapplicable state of facts.

The constitutional rights of the HELMS BAKERIES were raised by complaint, *i. e.*, paragraphs I, II, III, VII, VIII, IX, XI, XIII and XIV of the complaint. [Rec. pp. 1-9.] These allegations, in many respects, are not denied [Rec. 50-59], and are all found to be true after introduction of supported, competent or stipulated evidence with respect to those allegations that were denied. [Rec. pp. 50-59.] The decision of the District Court of Appeal recognizes that the constitutional question was raised and erroneously, without the full support of the cases mentioned as supporting its decision, brushes aside the federal question saying [Rec. p. 85] "respondent also suggests the point of appellants by their threatened action, are seeking to deprive respondent of a property right or privilege without due process of law. We consider the point would be untenable (see Sears, Roebuck & Co. v. Roddewig, 24 Fed. Supp. 321; and Morrison-Knudsen Co. v. State Board of Equalization, 35 Fed. Supp. 553.)"

4. The cases believed to sustain said jurisdiction are as follows:

Ohio Valley etc., v. Bar Avon Borough, 253 U. S. 287; 64 L. Ed. 908;

Home Tel. & Tel. Co. v. City of Los Angeles, 227 U. S. 278; 57 L. Ed. 510;

Fid. & Dep. Co. of Md. v. Tafoya, Chn., State Corp. Com. of New Mexico, et al., 270 U. S. 426, 434-5; 70 L. Ed. 664, 667;

Frisk v. Penn., 268 U. S. 473, 488-9; 69 L. Ed. 1058, 1062;

Louisville, etc. Ry., 188 U. S. 385, 394-5; 47 L. Ed. 5B, 517-8;

Raymond, Co. Treas. of Chicago v. Union Tr. Co., 207 U. S. 20, 35-6; 52 L. Ed. 78, 87;

Morrison Knudson Co. Inc. v. State Bd. of Equalization of Wyoming, 35 Fed. Supp. 553, 556;

Morris v. Alabama, 294 U. S. 587, 79 L. Ed. 1074;

United States of America v. Clrsie, 313 U. S. 299, 326; 85 L. Ed. 1368, 1383;

Milkwagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287, 85 L. Ed. 836;

Nashville etc. v. Wallace, Treasurer, 288 U. S. 249, 261-2; 77 L. Ed. 731, 735;

Pierce v. Society of Jesus, etc., 268 U. S. 510, 69 L. Ed. 1070;

Risty v. Great Northern, 270 U. S. 378, 70 L. Ed. 641;

Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 71 L. 303;

Terrace v. Thompson, 263 U. S. 197, 68 L. Ed. 255;

Laisne v. California State Board of Optometry, 19 Cal. (2d) 831;

Hurtado v. People of California, 110 U. S. 510, 28 L. Ed. 232, 238-9;

Nashville etc. Railway v. Wallens, Comptroller of the State of Tenn., 288 U. S. 249, 77 L. Ed. 730.

III.

Statement of the Case.

This has already been stated in the preceding petition which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

The District Court of Appeal of the State of California, First Appellate District, Division 2, erred in its decision wherein it held directly or indirectly;

1. That the Bakery owed the State of Calfornia a "reassessed tax imposed under the provisions of the Act." [Rec. p. 79.] The uncontroverted findings are to the contrary [Rec. pp. 17, 18];

2. That payment under protest and an action against the State Treasurer to recover the tax so paid is and was a remedy open to the Bakery; that the funds so paid could so be recovered and that this is the remedy to prevent the forfeiture or cancellation of a sales tax permit [Rec. p. 84];

3. That the cases cited in the opinion with reference to attempts to collect taxes imposed under unconstitutional statutes are applicable to an attempt to prevent cancellation of a sales tax permit for failure to pay an alleged tax where the statute has been amended to eliminate such a tax [Rec. pp. 84-85];

4. The forfeiture of a Sales Tax Permit is a constitutional method of collecting a Retail Sales Tax [Rec. p. 83].

5. That where there is evidence before the trial court of a great and irreparable injury, the District Court of Appeal may substitute its judgment for that of the trial

court, and that the failure of the appellant to offer evidence on the subject does not constitute a waiver [Rec. p. 85];

6. That even though the statute does not provide, under such circumstances, for the return of a sales tax permit, petitioner "would have been adequately compensated" if petitioner paid the tax under protest and then recovered it back with interest [Rec. p. 84];

7. The petitioner's contention that by the threatened forfeiture of the sales tax permit, the State Board of Equalization is attempting to "deprive respondent of a property right or privilege without due process of law is untenable." [Rec. p. 85.]

V.

ARGUMENT.

Summary of the Argument.

POINT A. The Board of Equalization had no right to forfeit the retail sales tax permit belonging to HELMS BAKERIES and therefore invaded petitioner's constitutional rights in attempting so to do because:

1. The repeal of the retail sales tax on edible foodstuffs by amendment to the statute, which amendment did not include any "saving" clause, repealed the right to collect assuming (not admitting), that there was any retail sales tax due from petitioner at any time;

2. The Statute of Limitations both on collection and on forfeiture had run at the time of bringing of the action in the Superior Court, and the right to collect or forfeit having lapsed, no forfeiture for any alleged failure to pay any sales tax was permissible;

3. The correctness of the following pertinent findin of the Superior Court is not questioned by the decision the District Court of Appeal and to forfeit the perm under such facts is a violation of petitioner's constitution rights;

(a) "That said routemen in reselling such food produc were independent contractors and were not servants ar employees of plaintiff" [Rec. p. 16];

(b) That under the Sales Tax Act, the tax was an is only on retail sales, and that the sales of food by th Bakery to the routemen (who as independent contractor sold to the consumers at retail) were not sales at retail, bu sales at wholesale and not taxable [Rec. p. 17];

(c) That by amendment effective July 1, 1935, ther was specifically "exempted from the provisions of sai Act, and from the computation of the amounts levied assessed or payable under said Act, the gross receipt from the sale of food products for human consumption;

(d) That "on or about December 8, 1939, the de fendants herein, knowing they had no jurisdiction or au thority to levy any purported assessment, whereby saic defendants purported to reassess against plaintiff so-called sales tax on so-called retail sales of food products during the three-quarters beginning October 1, 1934 and ending June 30, 1935. That plaintiff has heretofore paid to the State Board of Equalization all sales and use taxes, in- terest and penalties" [Rec. pp. 5-6];

(e) That the said State Board of Equalization "is with- out any jurisdiction, power or authority to revoke or sus- pend any retail sales tax permit except for failure to com- ply with the provisions of said Retail Sales Tax Act, or the rules and regulations of said State Board of Equaliza-

tion, and that at no time since June 30, 1935, or at any other time, has this plaintiff failed to comply with any provision of the Retail Sales Tax Act, or any rules and regulations of the State Board of Equalization, prescribed or adopted under such Act" [Rec. p. 8];

(f) That the amount claimed is $6,572.28 and there has been an overpayment of $27,963.46. [Rec. p. 5.]

4. In the event the plaintiff's permit is revoked "plaintiff would not be entitled to any existing provisions of the law of the State of California to recover said sums of money, or any interest thereon. That by reason of each and all of the facts herein alleged, plaintiff has no plain, speedy or adequate remedy at law."

POINT B. Forfeiture of the permit would be improper because a method for collection of delinquent taxes is provided by the Statute and the specific provision governs the general provisions.

POINT C. The section concerning forfeiture of the permit does not give the Board of Equalization the right to determine the existence of an indebtedness and there has been no Court determination in this case, nor does the statute provide for review by the courts. The section is not constitutional and deprives the petitioner of property rights without due process of law and the Board proposes to assume judicial powers not granted to it by the statute.

POINT D. The threatened forfeiture of a permit is not a constitutional method of procedure to collect an alleged civil debt, and such a method of procedure legalizes government by force and threat, and is a violation of the petitioner's constitutional rights.

POINT A.

The Board of Equalization Had No Right to Forfeit the Retail Sales Tax Permit Belonging to Helms Bakeries and Therefore Invaded Petitioner's Constitutional Rights in Attempting to So Do Because:

1. The repeal of the retail sales tax on edible foodstuffs by amendment of the statute, which amendment did not include any "saving" clause, repealed the right to collect, assuming (not admitting) that there was any retail sales tax due from petitioner at any time;

2. The statute of limitations both on collection and on forfeiture had run at the time of the bringing of the action in the Superior Court, and the right to collect or forfeit having lapsed, no forfeiture for an alleged failure to pay any sales tax was permissible;

3. The correctness of the following pertinent findings of the Superior Court is not questioned by the decision of the District Court of Appeal and to forfeit the permit under such facts is a violation of petitioner's constitutional rights:

(a) "That said routemen in reselling such food products were independent contractors and were not servants and employees of plaintiff" [Rec. p. 17];

(b) That under the Sales Tax Act, the tax was and is only on retail sales, and that the sales of food by the Bakery to the routemen (who as independent contractors sold to the consumers at retail) were not sales at retail, but sales at wholesale and not taxable [Rec. p. 16];

(c) That by amendment effective July 1, 1935, there was specifically "exempted from the provisions of said Act, and from the computation of the amounts levied, assessed or payable under said Act, the gross receipts from the sale of food products for human consumption";

(d) That "on or about December 8, 1939, the defendants herein, knowing they had no jurisdiction or authority to levy any purported assessment, whereby said defendants purported to reassess against plaintiff, so-called sales tax on so-called retail sales of food products during the three quarters beginning October 1, 1934, and ending June 30, 1935. That plaintiff has heretofore paid to the State Board of Equalization all sales and use taxes, interest and penalties" [Rec. pp. 5-6];

(e) That the said State Board of Equalization "is without power or authority to revoke or suspend any retail sales tax permit except for failure to comply with the provisions of said Retail Sales Tax Act, or the rules and regulations of said State Board of Equalization, and that at no time since June 30, 1935, or at any other time, has the plaintiff failed to comply with any provision of the Retail Sales Tax Act, or any rules and regulations of the State Board of Equalization, prescribed or adopted under such Act" [Rec. p. 8];

(f) That the amount claimed is $6,572.28, and there has been an overpayment of $27,963.46;

4. In the event the plaintiff's permit is revoked "plaintiff would not be entitled to any existing provisions of the law of the State of California to recover said sums of money, or any interest thereon. That by reason of each and all of the facts herein alleged, plaintiff has no plain, speedy or adequate remedy at law." [Rec. p. 8.]

1. The California Retail Sales Tax Act of 1933 (Statutes of 1933, p. 2599; Deering's Gen. Laws, Act 8394) was designed to raise funds for the operation of the State of California, and levied a tax of 2½% "for the privilege of selling tangible personal property at retail." The tax was and is imposed upon "retailers" at the rate of 2½% of the gross receipts of such retailer from the sale of "tangible personal property sold at retail in this state." The original statute was in effect until June 30, 1935, when the amendment of 1935 (Statutes of 1935, p. 1252) went into effect. This 1935 amendment is also known as Chapter 355 of the Statutes of 1935. By Section 1, it amended the title. By Section 2, it amended Section 5 of the original Act, stating in part:

> "Sec. 5. There is hereby specifically exempted from the provisions of this Act and from the computation of the amount of tax levied, assessed or payable under this Act, the following: * * * (e) The gross receipts from the sale of food products for human consumption. 'Food products' as used here included cereals and cereal products, milk and milk products * * * eggs and egg products * * *, fruit and fruit products * * * cocoa and cocoa products, other than candy and confectionery. * * *"

It is admitted that the products for which the State Board of Equalization proposed to tax Helms Bakeries were sold prior to the time the change in the law went into effect, and were food products within the 1935 exemption [Rec. p. 17]. The amending statute, Chapter 355 of the Statutes of 1935, contained no "saving" clause. Under the unchallenged findings of this case, at the time of the proposed forfeiture, HELMS BAKERIES, which sought and

received the injunction against forfeiture of its sales tax permit, had overpaid through error and mistake on foodstuffs, $27,963.46 [Rec. p. 5], and the State was trying to collect from it $6,572.28 [Rec. pp. 6-7]. The proceeding was in equity. Under the findings which are not overthrown, there was no sales tax due under any theory, however, assuming for the purpose of answering the apparent position of the State Board of Equalization and the incorrect assumption of the District Court of Appeal, that there was a tax unpaid for the period from October 1, 1934, to the effective date of the repeal of the statute, June 30, 1935, and disregarding the right to offset, any right to collect the same was lost. This is evidenced from the wording of the amending statute which says, in part:

> "* * * there are hereby specifically exempted from the provisions of this Act (and the Act includes the sections with respect to forfeiture of a permit, suit for collection, etc.) and from the computation of the amount of tax levied, assessed or *payable* (italics ours), under this Act * * * the gross receipts from the sale of food products. * * *"

The first step of the State Board of Equalization in attempting "the computation of the amount of tax levied, assessed or payable under this Act on * * * food products" was in 1938 [Rec. p. 4]. There was therefore no statutory authorization. There was assumption of authority not granted by statute to the State Board of Equalization. Such an arbitrary act is a violation of constitutional rights under the Fourteenth Amendment to the United States Constitution.

Home Tel. & Tel. Co. v. City of L. A., 227 U. S. 278, 57 L. Ed. 510.

Where a taxing statute is repealed without a "saving" clause to permit any subsequent collection, no action for collection will lie. Also, any attempt to collect such a tax by indirection is a violation of the constitutional rights of the person against whom the attempt is being made. An attempted forfeiture might be considered as an attempt to collect as the District Court of Appeal of the State of California assumes that it is, or might be merely spite-work. In either event, the Board or other governmental officer seeking to proceed in this manner is without power to do so.

U. S. v. Ship Helen, 6 Cranch. 203, 3 Law. Ed. 199;

Mason v. Sargent, 104 U. S. 689, 26 Law. Ed. 894.

The general rule is recognized in 59 C. J., commencing at page 1189 (Stats., Par. 727):

> "As a general rule, the repeal of a statute without any reservation takes away all remedies given by the repealed statute and defeats all actions and proceedings pending under it at the time of the repeal. The rule is especially applicable to the repeal of statutes creating a cause of action, providing a remedy not known to the common law or conferring jurisdiction where it did not exist before, and abates proceedings pending, even after judgment before the entry thereof, or pending on appeal."

2. Under the California Retail Sales Tax Act it is provided in Section 3 that "such tax shall be paid at the time and in the manner hereinafter provided * * *"; also, in subdivision 9, "the tax levied hereunder shall be a direct obligation of the retailer and shall be due and payable quarterly on or before the 15th day of the month

next succeeding each quarterly period * * *." Assuming, therefore, that we are incorrect in subdivision 1 of this argument (that the right to any tax on foodstuffs as sold by the routemen was abolished in 1935), and assuming that HELMS BAKERIES was the retailer and not the wholesaler who sold the edibles to the routemen who sold them to the public, the tax on the sales which are supposed to have been taxable was due as follows:

For the quarter commencing October 1, 1934, and ending December 31, 1934, on January 15, 1935;

For the quarter commencing January 1, 1935, and ending March 31, 1935, on April 15, 1935;

For the quarter commencing April 1, 1935, and ending June 30, 1935, on July 15, 1935.

Section 26 of the Retail Sales Act, as amended in 1935, provides in part:

> "At any times within three years after any retailer is delinquent in the payment of the tax herein provided for, the Board may proceed forthwith to collect the tax due from the retailer in the following manner: (Seizure and sale.)"

Section 30 of the same Act, as amended in 1935, provides in part:

> "At any time within three years after the delinquency of any tax, the Board may bring an action in a court of competent jurisdiction in the name of the People of the State of California to collect the amount delinquent, together with penalties * * *."

Prior to July 1, 1935, the period was two years. The statutory period passed prior to the attempted or threatened forfeiture.

Section 16 of the original Act has not been amended and provides:

> "Whenever the holder of a permit fails to comply with any of the provisions of this Act or any rules and regulations of the Board prescribed and adopted under this Act, the Board upon hearing after ten days' notice in writing of the time and place of the hearing to show cause why his permit should not be revoked, may revoke or suspend the permit."

Where a specific method has been set up in a statute with respect to the duties of a Board under that Act, that specific method governs and must be followed rather than a resort to a general procedure.

Southerland on Statutory Construction (2d Ed.) §348;

Townsend v. Little, 109 U. S. 504, 512, 27 L. Ed. 1012;

Pillsbury Flour Mills Co. v. Great Northern Railway Co., 25 Fed. (2d) 66, 68-69.

In this case, there has been no adjudication or determination that "* * * The holder of a permit fails to comply with any of the provisions of this Act." The Bakery not only has a right to a hearing in Court, but such a finding must be made and become final before the revocation or suspension of the permit may take place.

Laisne v. Cal. State Board of Optometry (March, 1942), 19 Cal. (2d) 831.

The section with respect to revocation or suspension of permits (Section 17) is not applicable until there has been a judicial determination and that there has been a failure

to comply. The section does not state "Whenever the holder of a permit HAS IN THE OPINION OF THE BOARD OF EQUALIZATION failed to comply." It does state "Whenever the holder of a permit fails to comply * * *." An examination of the statute indicates that the judicial power to determine any failure is absent from any statutory grant to the State Board of Equalization. Its assumption of legal right to act as a court and determine such a question of fact is arbitrary and a violation of the petitioner's constitutional rights.

Laisne v. Cal. State Board of Optometry, supra.

In 12 C. J. 845-6 (Const. Law, §329) the text writer says:

> "The power conferred to make regulations for carrying a statute into effect must be exercised within the powers delegated, that is to say, must be confined to details for regulating the mode of proceeding to carry into effect the law as it has been enacted, and it cannot be extended to amending or adding to the requirements of the statute itself; but it is to be presumed that regulations adopted were to carry out only the provisions of the statute and not to embrace matters not covered, nor intended to be covered, thereby."

Assuming, but not agreeing, that the three-year statute of limitations with respect to actions to collect is not applicable to forfeiture of a permit, even though the purpose of the forfeiture is to collect tax due, then the general California statute of limitations with respect to actions applies. Up to November 24, 1942, no such action has yet been filed. The proposed forfeiture proceedings before the State Board of Equalization were presumably

commenced by the State Board of Equalization in giving a notice in writing to the plaintiff to appear and show cause why its Permit AX-1887 should not be revoked. This was found by the Court to be "on or about May 20, 1940" [Rec. p. 6]. This was four years and ten months from the date the last payment should have been made under the State Board of Equalization's contentions. The statute of limitations in the State of California is set forth in its Code of Civil Procedure. Section 312 of the Code states:

> "Civil actions, without exception, can only be commenced within the period prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

The title referred to is Title 2 of the Code which is headed "Time of Commencing Civil Actions." An examination of the subject matter of the title involved indicates that the applicable section is C. C. P. 340, which provides in part as follows:

> "Within one year:
>
> "1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the State, except where a statute imposes and prescribes a different limitation;
>
> "2. An action on a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the people of this State. * * *"

It will be seen, therefore, that the time in which to forfeit has lapsed, either under the statute or under general law.

It is well settled law, both in the State of California and throughout the United States of America, that the Board

of Equalization has only such authority as is given to it under the statute and that forfeitures are not looked upon with favor and must be strictly construed.

Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 43 Fed. 341.

The California law on forfeitures is well set out in 23 Cal. Jur. 804 (Statutes 180), reading as follows:

> "The law abhors forfeitures, and statutes are construed strictly against them, or as liberally as possible to prevent them. An act will always be construed against a forfeiture if the language is fairly susceptible of such an interpretation. And a statute declaring a forfeiture will not be extended beyond its direct meaning by implication, unless such implication is imperative by reason of the subject matter or terms employed."

3. We have set forth a number of findings which have not been overturned by the District Court of Appeal in its opinion. In order to disregard them, the District Court of Appeal would have to overthrow them and find that the lower court was not warranted in so holding. Inasmuch as this has not been done and these findings are in effect, obviously the decision of the District Court of Appeal deprives the petitioner of its rights without due or any process of law.

The District Court disregarded the findings, acting upon the erroneous theory that an injunction would not lie in favor of a corporation against the arbitrary acts of a board, or an unconstitutional statute. It erred in so holding [Rec. p. 80].

Pierce as Governor v. Society of Jesus etc., 268 U. S. 510, 69 L. Ed. 1071.

4. The District Court of Appeal takes the position that a deposit of the money claimed with the state treasurer and an action to recover it, would have been a proper remedy, and that HELMS BAKERIES by following this remedy would have a right to recover its money back and, therefore, not suffer great and irreparable injury. This position assumes that the State Board of Equalization would not forfeit that sales tax permit, or it is not necessary to the operation of the business of HELMS BAKERIES, and there are other hurdles which are not specifically discussed in the decision; it assumes also that this statute or other statutes provide a method for the recovery of such money. Section 31 of the Retail Sales Tax Act provides, in part:

> "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this Act the collection of a tax sought to be collected; but after payment of any such tax under protest, duly verified and setting up the grounds of objection to the legality of such tax, the retailer paying such tax may bring an action against the State Treasurer in a court of competent jurisdiction in the County of Sacramento for the recovery of the tax so paid under protest. *No action may be instituted more than 60 days after the tax becomes due and payable.*" (Italics ours.)

There is no tax on foodstuffs under the statute, so why deposit the money not owed when one cannot sue to get it back because the time has lapsed? No claim of the Board against the Bakery was made until years after the 60-day period.

The prohibition of Section 31 of the statute is against an injunction to prevent or enjoin the collection of a tax

sought to be collected. The forfeiture of the sales tax permit is not an action to collect the "tax sought to be collected," but a penalty which would theoretically deprive the Bakery from making any further sales under the terms of the Act. The notice sent to the Bakery [Rec. p. 6] does not require it to show cause why the permit should not be revoked until and unless it pays the tax, nor does the section on revocation have any such provision. The term "the collection of any tax sought to be collected" used in Section 31 with respect to injunction relief obviously refers back to the previous section, Section 30, which provides that "At any time within three years after the delinquency of any tax, the Board may bring an action in a court of competent jurisdiction * * * to collect the amount delinquent, together with penalties." The State Board of Equalization had let the three years go by under this section and the one-year general penalty statute of limitations go by under the penalty section with respect to forfeiture of a sales tax permit. Hence, as held by the trial court, there can be no collection of the tax, and, obviously, the forfeiture of the permit would not be, was not, and could not be a method of collection. All that it would be would be "pressure." An injunction will lie in such cases and regardless of the statute does lie under such circumstances.

The rule is well set forth in 59 C. J. 1078 (Statute, §634), as follows:

> "A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, and made with a view to the proper, orderly, and prompt conduct of business, is usually directory, unless the phraseology of the

statute, or the nature of the act to be performed and the consequences of doing or failing to do it at such time, is such that the designation of time must be considered a limitation on the power of the officer."

A trial court of competent jurisdiction has found there is no liability, the state is indebted to the petitioner in far more than the amount claimed, and the statute itself gives no remedy by way of deposit in court or elsewhere. The observations of the District Court of Appeal with respect to Section 31, are beside the point and assume a state of facts not in accord with the evidence or findings. This remedy is not open to the petitioner and no recovery could be had.

The Proposed Forfeiture Is an Abuse of Process, and May and Should Be Enjoined.

Higgins v. Calif. Prune etc., 282 Fed. 550, 557-8.

This proposition is decided law in California under *Hugson, etc. v. State Bd. of Eq. of Cal.*, 23 Cal. App. (2d) 281, 3, holding "A number of authorities are cited in support of the proposition that such a provision of law (forfeiture for non-payment) is valid, and that no injunction to restrain the collection of the tax should issue, but that the person paying the tax is afforded a speedy and adequate remedy at law by paying the tax under protest and thereafter instituting proceedings for the recovery of the same." *That this position of the appellants is untenable readily appears from the fact that this action is not one to restrain the collection of a tax.* It is simply a proceeding having for its purpose the restraining of certain officers from canceling truck registration certificates, and thereby barring the plaintiff's trucks from the highway!

POINT B.

Forfeiture of the Permit Would Be Improper Because a Method of Collection of Delinquent Taxes Is Provided by the Statute and the Specific Provisions of the Statute Govern the General Provisions.

Where a method of collection is specifically provided by statute, even though it uses the word "may" instead of the word "must" that method is the one that must be followed. It takes precedence over any general plan, and particularly over any general penal plan not denominated as a collection method, and not containing a definite indication that it is usable for collection purposes, and which method may not result in a collection. This rule of construction is particularly true where the penal clause was passed prior to the collection clause as it now stands (the penal clause has not been amended since the original statute was passed in 1933; the collection clause was amended in 1935 changing the period of limitations on the bringing of such an action from two years to three years).

The Mayor of Galena v. The U. S., 72 U. S. 705, 18 L. ed. 560;

The Board of Supervisors v. The U. S., 71 U. S. 435, 18 L. ed. 419;

Uhl v. Bardaracco as Supervisors, etc., 199 Cal. 270, 282.

It is the general rule, not only in California but throughout the nation, that a statute or portion of a statute dealing with common subject matter in a minute way will always prevail over a general statute or a portion of a general statute dealing with the same subject matter in a general way.

Jackson v. Cravens (Circuit Court of Appeals, 5th Circuit), 238 Fed. 117;

Ahern v. Livermore Union High School District, 208 Cal. 770.

Furthermore, the statute in this case, which provides for collection, is upheld by the doctrine that where simillar terms are used in two parts of a statute they are construed as used together.

U. S. v. Baumgartner, 259 Fed. 722;

Puget Sound Electric Railroad, et al. v. Benson, 253 Fed. 710.

POINT C.

The Section Concerning Forfeiture Does Not Provide for Review by the Courts, Nor Does the Constitution Give a Board of Equalization Judicial Powers. No Review Being Possible, the Section Is Unconstitutional and Deprives the Petitioner of Property Without Due Process of Law.

We have mentioned that Section 16 of the Retail Sales Tax Act concerning revocation or suspension of a permit states: "Whenever the holder of a permit fails to comply with any of the provisions of this Act, or any rules and regulations of the Board prescribed and adopted under this Act, the Board upon hearing, after giving ten days notice in writing of the time and place of the hearing to show cause why his permit should not be revoked, may revoke or suspend the permit." We have mentioned that this section does not empower the State Board of Equalization to determine that there is an indebtedness until it has been adjudicated by competent authority. Thus, in this case, it had been pleaded [Rec. p. 17] that there is no legal basis for the forfeiture, and the trial court so held. The evidence and the pleadings do not disclose any Court determination of the indebtedness, and this is a prerequisite. Assuming, however, that we are incorrect in this interpretation, and that the law does provide that the State Board of Equalization may act as a trial court and take evidence, and then revoke a permit, the statute is not constitutional. We find no constitutional provisions in the Constitution of the

State of California granting such judicial power to the State Board of Equalization, and such a power would have to be granted by the Constitution and not by a statute of the legislature. This constitutional question has been recently considered by our Supreme Court in the case of *Laisne v. California State Board of Optometry, et al.* (March 16th, 1942), 19 Cal. (2d) 831. The proceeding was one for a writ of mandate to set aside an order of the State Board of Optometry revoking applicant's certificate of registration to practice optometry in California. The Board of Optometry revoking appellant's license, after a hearing as provided in Sections 3090-3091 of the Business and Professions Code. The complaint before the Board alleged violation by the applicant, an optometrist of sections of the Business and Professions Code. The Board of Optometry took evidence and determined on the evidence that the applicant had violated the provisions of the statute. The California Court says, in part (commencing on page 834—marked 2):

> "The powers of the government of the state are divided into three separate departments—the legislative, executive and judicial. (Article III, section 1, of the state Constitution.) State-wide judicial power may be exercised by only three *enumerated* courts, viz., the Supreme Court, the District Courts of Appeal, and the superior courts. (Article VI, section 1, of the state Constitution.) No other body can exercise state-wide judicial power except as the result of con-

stitutional amendment. (Pacific Coast Casualty Company v. Pillsbury, 171 Cal. 319 [153 Pac. 24]; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407 [156 Pac. 491, Ann. Cas. 1917E, 390].) If, therefore, some agency with state-wide jurisdiction, other than one of the enumerated courts, without sanction by constitutional amendment, exercises or attempts to exercise judicial power, such action is in direct violation of the articles of the state Constitution cited above.

It is true that there can be no complete separation of powers of government in an ever changing social order. It is equally true that each department for its own existence must in some degree exercise some of the functions of the others. That there can be no rigid line over which one department cannot traverse has been recognized since the first test of the doctrine of separation of powers. There still remains, however, this unalterable fact: When one department or an agency thereof exercises the complete power that has been by the Constitution expressly limited to another, then such action violates the implied mandate of the Constitution. If, in the instant case, the superior court in the mandate proceedings were limited to the evidence presented before the board, or if the findings of fact by the board were conclusive on the court, then the board would be exercising the complete judicial power reserved to the enumerated courts. The appellant's right to practice optometry was a vested property right. (Hewitt v.

State Board of Medical Examiners, 148 Cal. 590 [84 Pac. 39, 113 Am. St. Rep. 315, 7 Ann. Cas. 750, 3 L. R. A. (N.S.), 896; Suckow v. Alderson, 182 Cal. 247 [187 Pac. 965].) In the proceeding against him by the board all the rights of 'procedural' due process were accorded him, viz., notice, right to appear and answer the charges made against him. Witnesses were subpoenaed and evidence was taken. A reporter was present and a record made of the whole proceedings. At the conclusion of the hearing an order was made revoking appellant's license to practice. This then would be an exercise of the complete judicial power that was contemplated by the framers of the Constitution, and appellant would be deprived of his constitutional right unless he had a right to go into a court of law and question the validity of that order by the introduction of any material evidence to prove that he did not commit the acts alleged."

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287; 64 L. Ed. 908.

POINT D.

The Threatened Forfeiture of a Permit Is Not a Constitutional Method of Procedure to Collect an Alleged Civil Debt, and Such a Method or Procedure Legalizes Government by Force and Threat, and Is a Violation of the Petitioner's Constitutional Rights.

We have heretofore cited the case of *Fidelity & Deposit Co. v. Tafoya.* It illustrates one of the threats of the day against which the courts and citizens must guard. Government by pressure and threats is un-American and unconstitutional. Mr. Justice Holmes recognized this danger many years ago in the *Tafoya* case where the chairman and members of the State Corporation Commission of the State of New Mexico proposed to exclude the Fidelity & Deposit Company from their state, *i. e.,* to deny the right to certificate to do business in the state, because of alleged violations of the New Mexico law. Justice Holmes stated (270 U. S. 434, 70 L. Ed. 667):

> "Coming then to the merits we assume in favor of the defendants that the state has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result."

The forbidden result has here been accomplished. *Home Tel. etc. v. City of Los Angeles, supra.*

For any court to say substantially "Executive or Administrative State officials need not resort to the court but may by fiat destroy legitimate business without resort to court procedure to determine whether or not the corporation has been adjudged to have committed any offense," is to completely undermine our American system of government, which has three branches, executive, legislative and judicial.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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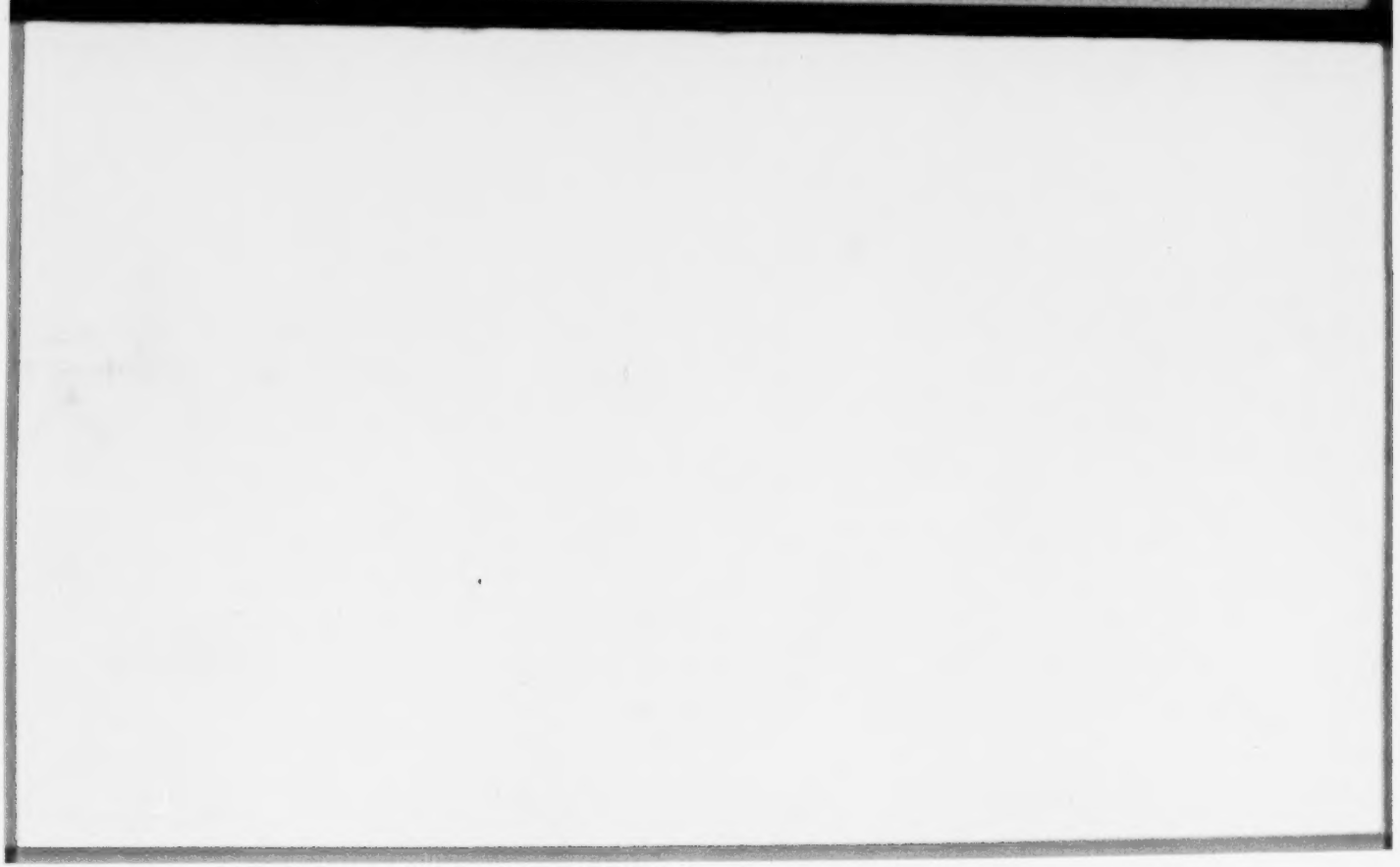

In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1942

No. 578

HELMS BAKERIES (a corporation),
Petitioner and Appellee Below,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, R. E. COLLINS, GEORGE R. REILLY, HARRY B. RILEY, FRED E. STEWART and WILLIAM G. BONELLI, individually and as members of the State Board of Equalization of the State of California,
Respondents and Appellants Below.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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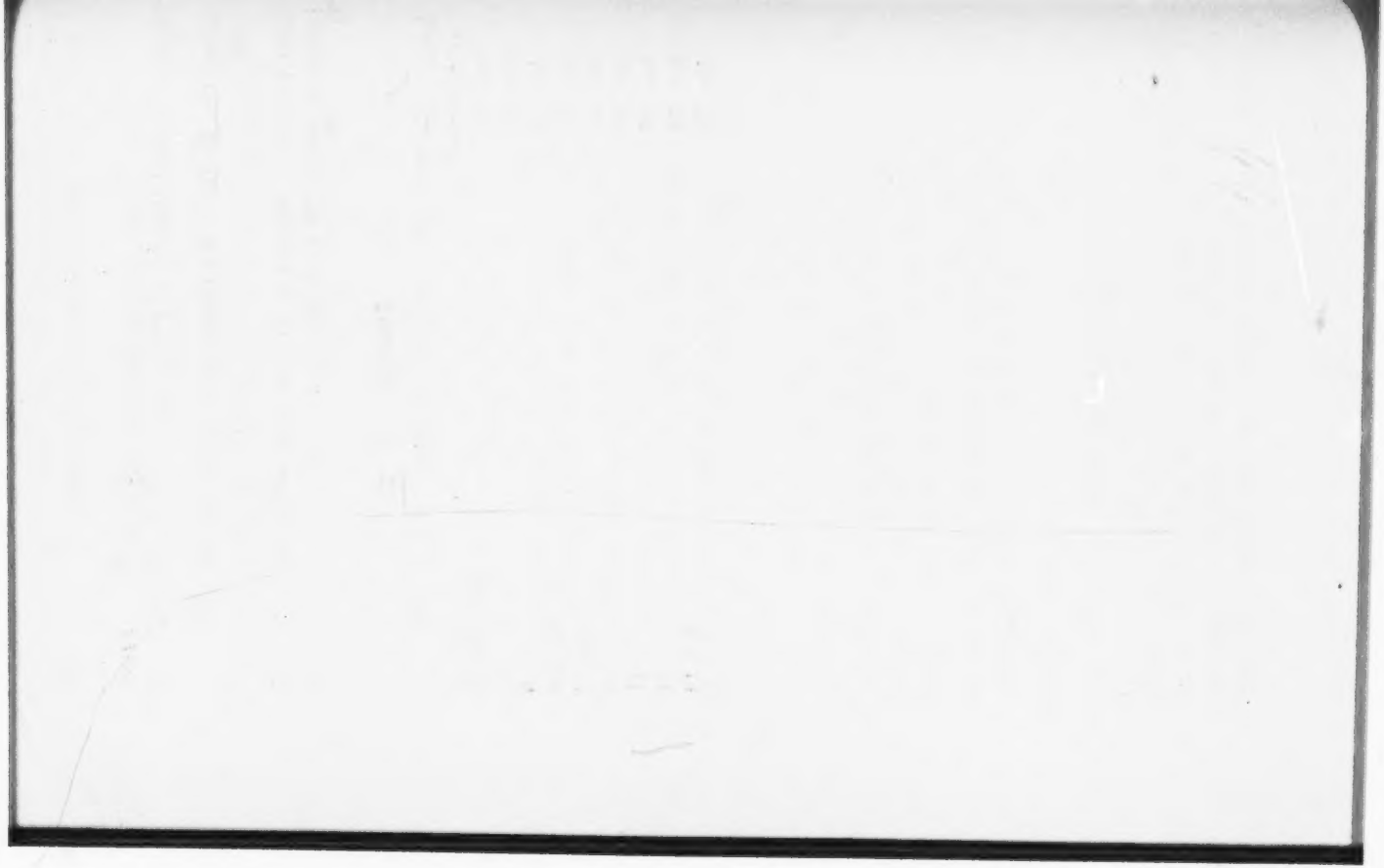

In the Supreme Court
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OCTOBER TERM, 1942

No. 578

HELMS BAKERIES (a corporation),
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STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, R. E. COLLINS, GEORGE R. REILLY, HARRY B. RILEY, FRED E. STEWART and WILLIAM G. BONELLI, individually and as members of the State Board of Equalization of the State of California,
Respondents and Appellants Below.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Petitioner has stated correctly on pages 4 to 6 of its petition the majority of the facts pertinent to its petition, but at page 4 there are certain serious inaccuracies. At page 4, petitioner states "Briefly, the

undisputed facts are: * * * It (petitioner) supplies more than 370 routemen with food products and other items for resale to consumers within the State of California." On the same page it states that "plaintiff, at wholesale, sold food products (during October 1, 1934, to June 30, 1935) to more than 200 routemen who resold such food products at retail to ultimate consumers, on the salesmen's own behalf and account". The statement that such alleged facts are undisputed is contrary to the record. The basis on which the additional assessment of tax was made by the State Board of Equalization was that petitioner was the retailer of its food products and that the routemen were employees of petitioner. (Tr. p. 53.) If the facts had been as stated by petitioner an additional assessment would never have been levied against it and this litigation would never have been instituted.

SUMMARY OF ARGUMENT.

Respondents' argument will be divided into two parts, the first part dealing with the question of jurisdiction, and the second part devoted to answering the contentions of petitioner.

It is respondents' belief that the petition is without standing in this court by reason of the lack of a final judgment in the courts of California.

However, if this court disagrees with our contention on the question of jurisdiction, respondents believe that the petition should be denied for there is no showing of any error by the District Court of Appeal of

the State of California. Respondents will show that the denial of the remedy of injunction was proper and that petitioner was accorded all of the notice and hearing required by the due process clause of the Federal Constitution.

ARGUMENT.

I. THERE IS NOT A FINAL JUDGMENT IN THIS ACTION AND THE PETITION IS PREMATURE.

This court does not have jurisdiction to review other than final judgments or decrees on certiorari to a state court. In the instant cause, a judgment granting a permanent injunction was rendered by a trial court and appeal therefrom taken to the Supreme Court of California which court, pursuant to authority, transferred the cause to the District Court of Appeal. The District Court of Appeal reversed the decision of the trial court, the order in the judgment being "The judgment is reversed". (Tr. p. 85.)

Under the law of the State of California, a reversal of a cause by an appellate court does not result in a final determination of that cause.

Atchison, Topeka & Santa Fe Railway Company v. Superior Court, 12 Cal. (2d) 549;
Monson v. Fischer, 219 Cal. 290;
Central Savings Bank v. Lake, 201 Cal. 438.

In the last cited case, the Supreme Court of California said at page 443:

> "It has long been the law in this state that an unqualified reversal remands the cause for a new

> trial, (Falkner v. Hendy, 107 Cal. 49, 54 (40 Pac. 21), and places the parties in the trial court in the same position as if the cause had never been tried, with the exception that the opinion of the court on appeal must be followed so far as applicable."

Thus the judgment of the District Court of Appeal does not meet the test laid down by this court to wit: that the judgment "must terminate the litigation between the parties on the merits of the case so that if there should be an affirmance the court below would have nothing to do but to execute the judgment or decree it had already entered".

Georgia Ry. & Power Co. v. Decatur, 262 U. S. 432, 437.

This court has held that a reversal by an appellate court of a trial court's decree granting a permanent injunction and remanding to the lower court for further proceedings is not a final judgment.

Pepper v. Dunlap, 18 How. 86, 15 L.Ed. 272.

II. THE JUDGMENT OF THE DISTRICT COURT OF APPEAL THAT PETITIONER DID NOT SHOW IRREPARABLE INJURY IS ADEQUATELY SUPPORTED BY THE RECORD.

The judgment of the District Court of Appeal was based on two grounds either of which would have been adequate to support the judgment. The first was that the granting of an injunction was not proper because the petitioner had a plain, speedy and adequate remedy at law. The second was that the injunction was

not proper because there was no showing of irreparable injury. The court dismissed as untenable the argument of petitioner that the threatened action would deprive petitioner of a property right or privilege without due process of law. (Tr. p. 85.)

It is clear that under the decisions of this court and those of the Supreme Court of California proof of irreparable injury is essential to the granting of an injunction.

Dows v. Chicago, 11 Wall. 108, 20 L. Ed. 65;
Boise Artisian Water Co. v. Boise City, 213 U. S. 276;
Petroleum Exploration, Inc. v. Public Service Comm., 304 U. S. 209, 218;
California v. Latimer, 305 U. S. 255, 261;
E. H. Renzel Co. v. Warehousemen's Union, 16 Cal. (2d) 369, 373.

The only evidence before the trial court which could have the slightest bearing on the question of irreparable injury was the simple statement of the president of petitioner that the sale of flour sacks and barrels (comprising less than three-tenths of one per cent of its sales and purely residual to its business, to wit, the sale of bread and other bakery products) was in his opinion a necessary part of the business. (Tr. p. 36.) The District Court of Appeal determined that no showing of irreparable injury has been made. This determination, which is clearly justified by the record, is sufficient to sustain the judgment and this court should not grant the petition.

III. PETITIONER HAD A PLAIN, SPEEDY, AND ADEQUATE REMEDY AT LAW.

The action in the Superior Court of the State of California was initiated for the purpose of enjoining the threatened revocation by the California Board of Equalization of a retailer's permit held by the petitioner. The record is clear that the only reason for this threatened revocation was the failure of petitioner to pay a certain assessment of additional tax under the Retail Sales Tax Act. (Tr. p. 6.) There is no question but that payment of the tax would have prevented the revocation and the threat of revocation was conditioned on that premise. In the event such payment had been made within the period provided by law the statute (Retail Sales Tax Act, Cal. Stats. 1933, p. 2599 as amended, (sec. 23))[1] provided that a claim for refund should be filed within six months after the date the assessments under Sections 17 or 18 become final and suit commenced within ninety days after the denial of such claim. (Sec. 31.) A judgment in such suit carries interest at the rate of six percent per annum from the date of payment of the tax. This remedy has been held adequate so as to preclude the issuance of an injunction by the federal courts.

Corbett, et al. v. Printers and Publishers, 127 Fed. (2d) 195;

Cf. *Nevada-California Electric Corp. v. Corbett,* 22 Fed. Supp. 951.

The petitioner in the instant case was mailed notice of denial of its petition for reassessment on December

[1]Sections 16, 17, 20, 23 and 31, of the Retail Sales Tax Act as they provided on July 1, 1939, are set forth in Appendix A.

8, 1939, and under section 20 the assessment became final on January 7, 1940. Thus a payment could have been made and claim for refund filed on or before July 6, 1940, which was fifteen days after the complaint for an injunction was filed and forty-five days subsequent to the notice of hearing on the question of revocation. (Tr. p. 6.) Therefore, at the time of the threatened revocation, the petitioner had a plain, speedy and adequate remedy at law and by adopting the statutory procedure could have avoided any question of forfeiture of its permit.

Matthews v. Rodgers, 284 U. S. 521.

Petitioner, at pages 34 to 36 of its petition and brief contends that at the time the additional assessment of tax was levied the time to file suit for refund had already elapsed and therefore the remedy provided was not adequate. As illustrative of its position, petitioner cites a portion of section 31 of the Retail Sales Tax Act. This cited language was amended effective July 1, 1939, so that the provision relative to suit thereafter read that suit must be begun within ninety days after rejection of a claim for refund. Petitioner refers to the section prior to amendment when it allowed sixty days after the tax was due and payable within which to file a suit for refund, and under section 20 of the Act the tax herein question was due and payable on January 6, 1940.[2] In any event, section 31 as it read both before and after amendment did not operate as a bar to payment by

[2]Section 31 of the Retail Sales Tax Act as it read prior to amendment in 1939 is set forth in Appendix B.

petitioner and suit for refund after the additional assessment had been made.

Section 20 provides in part:

> "Any retailer against whom an assessment is made by the board under the provisions of Section 17 or 18 hereof may petition for a reassessment thereof within 30 days after service upon the retailer of notice thereof. If a petition for reassessment is not filed within said 30-day period the amount of the assessment becomes final at the expiration thereof. * * *
>
> The order or decision of the board upon a petition for reassessment shall become final 30 days after service upon the retailer of notice thereof.
>
> "All assessments made by the board under the provisions of Section 17 or 18 hereof shall become due and payable at the time they become final and if not paid when due and payable there shall be added thereto a penalty of 10 per cent of the amount of the tax. * * *"

The Supreme Court of California has recently held that a tax levied under section 17 of the Act is not delinquent until it is due and payable as provided in section 20.

People v. Hochwender, 20 Cal. (2d) 181.

This decision respondents believe completely disposes of petitioner's contention that at the time the additional assessment became final petitioner was barred from commencing a suit for refund and its contention that respondent is barred from commencing an action to collect the tax due by reason of the additional assessment.

If, by reason of failure to follow the administrative remedies, petitioner is barred from recovery of the amount assessed that neglect on the part of the taxpayer does not render the remedy any the less plain, speedy and adequate and the petitioner is barred from injunctive relief.

Phipps v. School District of Pittsburgh, 111 Fed. (2d) 393;

Moulton v. Knapp, 85 Cal. 385.

IV. THE BOARD OF EQUALIZATION FOLLOWED THE PROPER STATUTORY PROCEDURE FOR REVOCATION.

Petitioner attacks the procedure of the Board of Equalization relative to the threatened revocation of the retailer's permit presumably on the ground that under the statute an adjudication in court that the permittee has been guilty of violation of the rules and regulations of the Board of Equalization must be had before the Board can issue its order to show cause why the permit should not be revoked. This contention is obviously absurd. Petitioner as evidenced by its citation of *Laisne v. California State Board of Optometry,* 19 Cal. (2d) 831, has confused the right of an administrative Board to revoke a license with the right of the licensee to a review of the order of revocation by a court. The interpretation placed by petitioner upon Section 16 of the Retail Sales Tax Act would render it an absolute nullity. The question of determination of the existence of a violation should be for the administrative board in the first instance.

City of Chicago v. Kirkland, 79 Fed. (2d) 963.

The contention urged by petitioner would result in absurd situations making impossible a revocation of a retailer's license by the State Board of Equalization. Although a judicial determination of the validity of an assessment of tax could be had prior to a revocation of the license by the Board of Equalization there are many cases of violation of the rules and regulations where the only judicial determination possible would be in a court proceeding for revocation. The legislature did not provide for a court proceeding for revocation but rather an administrative proceeding. If an administrative board had to wait in each case for a judicial determination of violation the whole theory upon which Section 16 is based would fall for there would be no speedy and efficient method to insure observance of the promulgated rules and regulations and the use of revocation as a means of collection of tax would be worthless.

V. THE TRIAL COURT FINDINGS ARE INEFFECTIVE.

Petitioner has throughout its petition and the supporting brief urged that the findings of the trial court compel certain conclusions, as to the rights of petitioner, by this court. In this regard, respondents desire to call to the attention of the court the inaccurate statements by petitioner that the findings were undisputed. This is inaccurate for appeal was taken from the whole judgment and under California law such an appeal entitles the appealing party to question all of the findings of the trial court. Respondents, in the opening brief in the California District Court of Ap-

peal, attacked each of the findings to which petitioner refers.

Cortelyou v. Imperial Land Co., 166 Cal. 14.

In so far as the argument of petitioner relative to the failure of the District Court of Appeal to overturn the findings is concerned, it is clear that the judgment of the appellate court does not consider them for the reason that it determined that the trial court did not have jurisdiction to grant an injunction thus making any question of the validity of or liability for the tax immaterial. The trial court has thus been held not to have jurisdiction to pass upon the question of liability for the tax and any findings it made upon this question were void.

VI. THE PROVISION FOR COLLECTION OF TAXES BY SUIT IN THE RETAIL SALES TAX ACT DOES NOT RESTRICT THE STATE TO THE USE OF THAT METHOD.

Petitioner urges that as Section 30 provides for collection by suit that remedy is the sole method of collection. Petitioner ignores, however, the fact that Section 26 provides several other methods of collection, such as writ of execution issued upon an administrative "judgment", warrant of distraint and seizure and sale. Section 26 further specifically states:

> "It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the board or Attorney General shall be construed to be an election on the part of the State or any of its officers to pursue any

remedy hereunder to the exclusion of any other remedy for which provision is made in this act."

Thus, the argument advanced by petitioner has no pertinence in view of the provisions of the statute.

VII. SECTION 16 IS NOT UNCONSTITUTIONAL.

Petitioner contends that Section 16 of the Act is violative of the United States and California constitutions if it allows the Board of Equalization to determine liability for taxes and upon failure to pay to revoke the permit of the delinquent taxpayer. Petitioner cites *Laisne v. California State Board of Optometry,* 19 Cal. (2d) 831, in support of this position. The *Laisne* case offers no aid to petitioner for it did not state that the violation must be judicially determined prior to revocation but simply said that *after* a revocation of a license the licensee was entitled to a judicial trial de novo to determine the correctness of the order of revocation. In addition, the case did not involve a taxing statute which is of great importance in view of the consistent view of the courts that in most instances taxes should be paid prior to any questioning by legal action.

Dows v. Chicago, 11 Wall. 108;
Shelton v. Platt, 139 U.S. 591;
Dodge v. Osborn, 240 U.S. 118.

The Retail Sales Tax Act provides the liability of the taxpayer and its method of determination. That liability can be questioned by the taxpayer in the

method provided by the statute but unless the proper remedies are followed the liability is final without judicial determination.

People v. Richardson, 37 Cal. App. (2d) 275;
People v. Mahoney, 13 Cal. (2d) 729, 735;
Retail Sales Tax Act, sections 23, 31.

In the instant cause, petitioner had notice of the assessment of the tax and a hearing thereon, it had notice of the intention to revoke its license for non-payment of the tax and a hearing on that question. It could have followed the procedure provided in the statute and avoided the threat of revocation. It refused to do this and now contends that the burden was on the Board of Equalization to establish the tax liability by judicial process before it could act under Section 16. Such a proceeding is unheard of in any system of taxation, federal or state, and would be contrary to the whole principle of tax law.

Petitioner places some reliance on *Fidelity & Deposit Co. v. Tafoya,* 270 U. S. 434. It is difficult to see the pertinence of that case for it involved the effort of New Mexico to restrain the acts of a foreign corporation done outside New Mexico by revoking its permit to do business in New Mexico. In the instant cause there is no effort at extraterritorial results or illegal results and petitioner is a California corporation. Respondents are seeking only to restrain the doing of specified acts in California by a California corporation by reason of its failure to pay taxes imposed by the laws of California. There is no scheme to accomplish a forbidden result such as was referred

to in the *Tafoya* case. The Board of Equalization is simply seeking to enforce a method used for collection of a tax, a procedure which respondents submit is clearly proper.

Osborn v. Ozlin, 310 U.S. 53;

J. C. Penney Co. v. Wisconsin Tax Comm., 311 U.S. 435;

Kansas City, Memphis & Birmingham Rd. Co. v. Stiles, 242 U.S. 111, 118;

Sears Roebuck v. Roddewig, 24 Fed. Supp. 321.

CONCLUSION.

We urge that the petition for writ of certiorari be denied.

Dated, San Francisco, California,
January 11, 1943.

Respectfully submitted,

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(Appendices A and B Follow.)

RETAIL SALES TAX ACT.

Sec. 16. Whenever any person has failed to comply with any of the provisions of this act or any rules or regulations of the board prescribed and adopted under this act, the board upon hearing, after giving to such person ten days' notice in writing specifying the time and place of such hearing and requiring him to show cause why his permit or permits should not be revoked, may revoke or suspend any one or more of the permits held by such person. Such notice may be served personally or by mail in the same manner as prescribed for service of notice by the provisions of section 17 hereof. A new permit shall not be issued after the revocation of a permit unless it appears to the satisfaction of the board that the former holder of the permit will comply with such provisions and regulations. (Statutes 1939, Chapter 679; operative July 1, 1939.)

Sec. 17. The burden of proving that a sale of tangible personal property is not a sale at retail shall be upon the person who makes it, unless such person takes from the purchaser a certificate to the effect that the property is purchased for resale. Such certificate relieves the seller from such burden only if taken in good faith from a person engaged in the business of selling tangible personal property and holding the permit provided for in section 12 of this act and who, at the time of purchasing the tangible personal property, intends to sell it in the regular course of business or is unable to ascertain at the time of purchase

whether such property will be sold or will be used for some other purpose. Such certificate shall be signed by and bear the name and address of the purchaser, shall indicate the number of the permit issued to such purchaser under this act, and shall indicate the general character of the tangible personal property sold by such purchaser in the regular course of business. Such certificate shall be substantially in such form as the board may prescribe.

If a purchaser who gives such a certificate makes any use of such property other than retention, demonstration, or display while holding it for sale in the regular course of business, such use shall be deemed a retail sale by such purchaser as of the time such property is first used by him and the cost of such property to him shall be deemed the gross receipts from such retail sale. If the sole use of such property other than retention, demonstration or display in the regular course of business is the rental of the property while holding it for sale, the purchaser may elect to include in his gross receipts the amount of the rental charged rather than the cost of the property to him.

For the purpose of the proper administration of this act and to prevent evasion of the tax hereby imposed it shall be presumed that all gross receipts are subject to the tax hereby imposed until the contrary is established. If the board is not satisfied with the return or returns of tax made by any retailer, it is hereby authorized and empowered to make an additional assessment of tax due from such retailer based upon the facts contained in the return or returns, or

upon any information within its possession or that shall come into its possession. An additional assessment may be made of the amount of tax due for more than one period. The amount of tax so assessed shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from the fifteenth day after the close of the quarterly period for which the amount of such tax or any portion thereof should have been returned until the date of payment. In making an assessment hereunder the board may offset overpayments for a period or periods together with interest on such overpayments, against underpayments for another period or periods against penalties, and against the interest on such underpayments. Such interest on underpayments and overpayments shall be computed in the manner set forth in sections 9½ and 23 hereof. If any part of the deficiency for which the additional assessment is imposed is due to negligence or intentional disregard of the act or authorized rules and regulations, a penalty of 10 per cent of the amount of the additional assessment shall be added thereto. If any part of the deficiency for which the additional assessment is imposed is due to fraud or an intent to evade the tax, a penalty of 25 per cent of the amount of the additional assessment shall be added thereto. The board shall give to the retailer written notice of such additional assessment. Such notice may be served upon the retailer personally or by mail; if by mail, service shall be made in the manner prescribed by section 1013 of the Code of Civil Procedure and addressed to the retailer at his address as the same appears in the records of the board. (Statutes 1939; Chapter 679; operative July 1, 1939.)

Sec. 20. Any retailer against whom an assessment is made by the board under the provisions of section 17 or 18 hereof may petition for a reassessment thereof within thirty days after service upon the retailer of notice thereof. If a petition for reassessment is not filed within said thirty-day period the amount of the assessment becomes final at the expiration thereof.

If a petition for reassessment is filed within said thirty-day period the board shall reconsider the assessment, and if the retailer has so requested in his petition, shall grant said retailer an oral hearing and shall give the retailer ten days' notice of the time and place thereof. The board shall have power to continue the hearing from time to time as may be necessary.

The board may decrease or increase the amount of the assessment. The amount of the assessment may be increased, however, only if a claim for such increase is asserted by the board at or before the hearing.

The order or decision of the board upon a petition for reassessment shall become final thirty days after service upon the retailer of notice thereof.

All assessments made by the board under the provisions of section 17 or 18 hereof shall become due and payable at the time they become final and if not paid when due and payable there shall be added thereto a penalty of 10 per cent of the amount of the tax.

Any notice required by this section shall be served personally or by mail in the same manner as prescribed for service of notice by the provisions of sec-

tion 17 hereof. (*Statutes 1939, Chapter 679; operative July 1, 1939.*)

Sec. 23. If the board determines that any tax, penalty or interest has been paid more than once, or has been erroneously or illegally collected, the board shall set forth that fact in the records of the board and shall certify to the State Board of Control the amount collected in excess of what was legally due, from whom it was collected, or by whom paid, and if approved by that board the same shall be credited on any taxes then due from the retailer under this act or under the California Use Tax Act of 1935 and the balance shall be refunded to the retailer, or his successors, administrators, or executors, but no such credit or refund shall be allowed unless a claim therefor is filed with the State Board of Equalization within three years from the fifteenth day after the close of the quarterly period for which the overpayment was made or, with respect to assessments made under the provisions of sections 17 and 18 hereof, within six months after such assessments become final, whichever period expires the later.

Every such claim must be in writing and must state the specific grounds upon which the claim is founded.

Failure to file such claim within the time prescribed in this section shall constitute waiver of any and all demands against this State on account of overpayments hereunder. Within thirty days after disallowing any such claim in whole or in part, the board shall serve notice of such action on the claimant, such service to be made as provided by section 17 hereof.

Interest shall be computed, allowed and paid upon any overpayment of any tax, at the rate of one-half of one per centum per month as follows:

(1) From the fifteenth day of the calendar month following the quarterly period for which the overpayment was made but no refund or credit shall be made of any interest imposed upon the claimant with respect to the tax being refunded or credited.

(2) In the case of a refund, to the fifteenth day of the calendar month following the date upon which the claimant is notified by the board that a claim may be filed or that the claim has been certified to the State Board of Control, whichever date is the earlier.

(3) In the case of a credit, to the same date that interest is computed on the tax against which the credit is applied.

Any refund or any portion thereof which is erroneously made and any credit or any portion thereof which is erroneously allowed, may be recovered in an action brought by the Controller of the State in a court of competent jurisdiction in the county of Sacramento, in the name of the people of the State of California and such action shall be tried in the county of Sacramento unless the court with the consent of the Attorney General, orders a change of place of trial. The Attorney General must prosecute such action, and the provisions of the Code of Civil Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for.

In the event that a tax has been illegally levied, the board shall certify such fact to the State Board of Control and said board shall authorize the cancellation of the tax upon the records of the board.

If the board determines that any overpayment of tax has been intentionally made or made by reason of carelessness, it shall not allow any interest thereon. (Statutes 1939, Chapter 679; operative July 1, 1939.)

Sec. 31. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin the collection under this act of any tax sought to be collected, and no suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally assessed or collected unless a claim for refund or credit has been duly filed as provided in section 23 hereof.

Within ninety days after the mailing of the notice of the board's action upon such claim, the claimant may bring an action against the board on the grounds set forth in such claim in a court of competent jurisdiction in the county of Sacramento for the recovery of the whole or any part of the amount with respect to which such claim has been disallowed.

If the board fails to mail notice of action on any such claim within six months after the claim is filed the claimant may, prior to mailing notice of action on such claim by the board, consider the claim disallowed and bring an action against the board on the grounds

set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment. Failure to bring suit or action within the time specified shall constitute a waiver of any and all demands against this State on account of any alleged overpayments hereunder.

If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes due from the plaintiff under this act or under the California Use Tax Act of 1935, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of 6 per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the board.

In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the board to recover any tax paid hereunder, when such action is brought by or in the name of an assignee of the retailer paying said tax, or by any person other than the person who has paid such tax. (*Statutes 1939, Chapter 679; operative July 1, 1939.*)

Appendix B

RETAIL SALES TAX ACT.

Section 31. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any tax sought to be collected; but after payment of any such tax under protest, duly verified and setting forth the grounds of objection to the legality of such tax, the retailer paying such tax may bring an action against the State Treasurer in a court of competent jurisdiction in the county of Sacramento for the recovery of tax so paid under protest. No such action may be instituted more than sixty days after the tax becomes due and payable, and failure to bring suit within said sixty days shall constitute waiver of any and all demands against this State on account of alleged over-payment of taxes hereunder. No grounds of illegality of the tax shall be considered by the court other than those set forth in the protest filed at the time of the payment of the tax.

If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes due from the plaintiff under this act, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of six per cent per annum upon the amount of tax found to have been illegally collected from the date of payment of such tax to the

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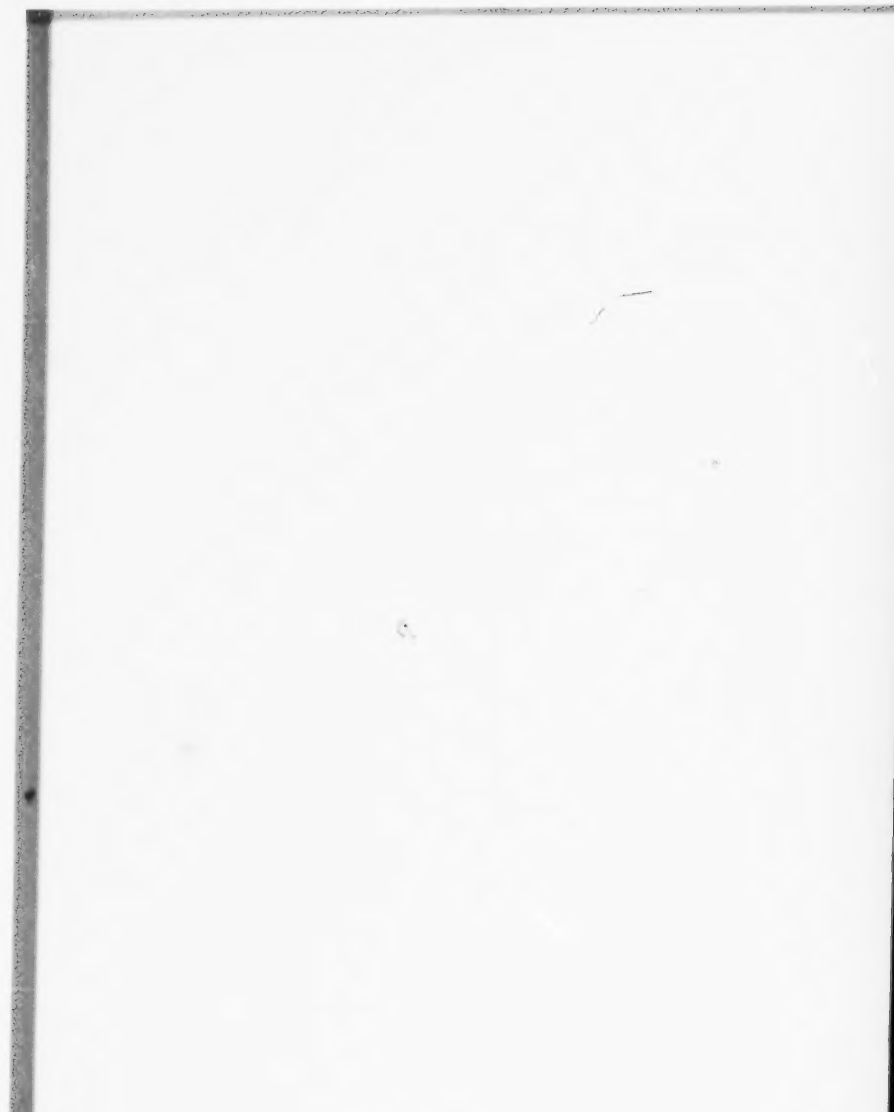
date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the Controller.

In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any tax paid hereunder, when such action is brought by or in the name of an assignee of the retailer paying said tax, or by any person other than the person who has paid such tax. (*Original section; Statutes 1933, p. 2610.*)



(27)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 578

HELMS BAKERIES, a corporation,

Petitioner,

vs.

STATE BOARD OF EQUALIZATION OF CALIFORNIA, FORNEY, RILEY, individually and as Members of the State Board of Equalization,

Respondents.

REPLY BRIEF OF PETITIONER

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JAN 28 1948
CLERK

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IN THE

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OCTOBER TERM, 1942.

No. 578.

HELMS BAKERIES, a corporation,

Petitioner and Appellee Below,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, R. E. COLLINS, GEORGE R. REILLY, HARRY B. RILEY, FRED E. STEWART and WILLIAM G. BONELLI, individually and as members of the State Board of Equalization of the State of California,

Respondents and Appellants Below.

REPLY BRIEF OF PETITIONER.

Introduction

Your petitioner believes that all the points made by respondents are subject to answer, and therefore will briefly answer the contentions of respondents.

Answer to Statement of the Case.

(Respondents' Brief, pp. 1 and 2.)

There is no hiatus in the statement of facts. There were 370 routemen, as pleaded. However, only 200 of these purchased their food products and resold them at retail to the ultimate consumer. Obviously, the other 170 were salesmen selling for Helms Bakeries. There is and was no question involved about the sales of the 170 during the period prior to the repeal of the statute. The case deals with the sales of the 200 who purchased their bakery goods from Helms Bakeries and resold them at retail to the ultimate consumer.

Reply to Argument of Respondents.

1. The Petition Is Not Premature.

The respondents contend that the court is without jurisdiction in that the petition is premature. There is no question about the California rule that the reversal of a trial court's judgment ordinarily leaves the matter in the position "* * * as if the cause had never been tried, WITH THE EXCEPTION THAT THE OPINION OF THE TRIAL COURT ON APPEAL MUST BE FOLLOWED SO FAR AS APPLICABLE." (*Central Saving Bank v. Lake*, 201 Cal. 438, 443, quoted in respondents' brief at top of page 4. Capitalization is ours.)

An examination of the judgment of the District Court of Appeal in this case [Tr. of Rec. p. 78 *et seq.*] and the original pleadings shows that the case was one for a prohibitory injunction to prevent the forfeiture of a license, with the result that:

(a) A prohibitory injunction is denied and may not be granted on the return of the case to the lower court; and

(b) The court says the Bakery's remedy was to pay the money and then bring action for its return. Obviously this action cannot be used for that purpose as it is prerequisite that the money be deposited prior to the bringing of any action. The action is, for all purposes, therefore terminated because "* * * the opinion of the court on appeal must be followed * * *". (*Central Savings Bank v. Lake, supra.*)

The Bakery contends that the court has jurisdiction because in this case there is drawn into consideration "First, the validity of a statute (the Cal. Retail Sales Tax Act of 1933, as amended) on the ground of its being repugnant to the Constitution, and the decision of the court of last resort in California is in favor of the statute's validity, and Second, the title, right, privilege, or immunity which is specially set up or claimed by applicant under the Constitution * * *" is drawn into question. (App. Pet. for allowance of Writ p. 7.)

Such a petition for a prohibitory injunction, raising a constitutional question, is subject to review by the United States Supreme Court. Such has been the law ever since the days of Chief Justice John Marshall.

In *Plowden Weston, et al. v. The City Council of Charleston,* 2 Peters 449, 2 L. Ed. 461, a writ of error was sought to the Constitutional Court of South Carolina. The City Council of Charleston passed an ordinance to raise money for the use of the City. The ordinance taxed, among other things, stock of United States banks. In the trial court the plaintiff asked for a prohi-

bition (prohibitory injunction) to restrain levy under the ordinance. A prohibitory injunction was granted by the trial court, the City appealed to the Constitutional Court as the highest court of law in the state, to reverse the order, upon the ground that the city ordinance was not repugnant to the Constitution of the United States. This last court of the state, by a majority of the judges, decided in favor of the constitutionality of the ordinance, and held that it did not violate the Constitution of the United States. From this decision the plaintiff in the trial court, as petitioner, proceeded by writ of error to the Supreme Court of the United States. The error assigned was that the judgment of the Constitutional Court was erroneous in that it decided that the ordinance of the City Council of Charleston was not repugnant to the Constitution of the United States. Mr. Chief Justice Marshall in his opinion (pp. 463-464) points out that a doubt having arisen with respect to jurisdiction of the United States Supreme Court to consider cases of prohibition, a re-argument was requested, and that the matter was reargued on this subject. We will not here quote the decision, but it holds definitely that the Supreme Court has jurisdiction in cases of this sort. This decision on jurisdiction is still the law of the United States of America.

In *King Manufacturing Comuany v. City Council of Augusta, et al.*, 277 U. S. 100, 72 L. Ed. 801, the same question arose and the court held that a municipal ordinance sustained by the state court against the objection that it violates provisions of the Federal Constitution is within the operation of the Act of February 13, 1925, Chapter 229, U. S. C. Title 28, Paragraph 344.

It is immaterial whether the unconstitutional ordinance or usurpation of power is by a city council or any other body.

Home Telephone & Telegraph Company v. City of Los Angeles, 227 U. S. 228, 57 L. Ed. 510.

Other cases of similar effect are:

Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Company, 240 U. S. 30, 60 L. Ed. 507;

The Board of Commissioners of Tippecanoe County v. Martin Lucas, as Treasurer, 93 U. S. 108, 23 L. Ed. 822.

2. Respondents' Contention That "Petitioner Did Not Show Irreparable Injury * * *" Is Not an Answer to the Petition in That (a) the Court on Appeal May Not Substitute Its Judgment as to the Facts for the Judgment of the Trial Court; and (b) There Is Other Evidence of Great and Irreparable Injury Other Than That Mentioned by the District Court of Appeal.

(a) In this case, there were portions of the complaint which were not challenged, there were stipulations of fact, and there was testimony. There was no evidence contrary to the evidence of Helms Bakeries. There was stipulated or actual evidence on all controverted points, which evidence was not in any way contradictory. Under such circumstances it is a denial of the rights of Helms Bakeries for the District Court of Appeal to substitute its judgment for that of the trial court.

In 2 *California Jurisprudence* 1028-9 (Appeal and Error, #612) we read:

"But if a judgment is amply supported by findings which are unobjectionable, findings on other issues

become immaterial, and it is not ground for reversal that such findings are unsupported by evidence, or are uncertain or otherwise defective. However unsupported or inconclusive any number of findings may be, if in any case there be at least one clear, sustained and sufficient finding upon which the judgment may rest, every presumption being in favor of the judgment, it will be concluded on appeal that the court rested its judgment upon that finding (or such findings) and the others will be disregarded. Moreover, any error in finding against any appellant on a particular issue is without prejudice to him, if the judgment gave him all the relief to which he was entitled had the finding been in his favor. So, also, a general verdict imports findings in favor of the prevailing party on all material issues, and if upon such a verdict one issue alone is sustained by the evidence and is not affected by any error, the want of evidence to sustain the finding on the other issues or any errors committed in regard to them cannot be prejudicial."

The sufficiency of the evidence could not be considered on appeal as the record discloses no motion for a new trial.

Myers v. Casey and Kelley, 14 Cal. 542.

(b) There was evidence in support of the findings of the trial court that there was irreparable injury and there were allegations on this point which were not denied by the answer. Referring to the complaint, it will be seen [Tr. pp. 1-2] that there were 370 salesmen, of which 170 routemen were not independent contractors; that plaintiff had on hand large quantities of raw materials which would deteriorate and spoil if not used while fresh. In paragraph III of the complaint, on page 2,

it is alleged that "plaintiff now is" a seller under the terms of the Retail Sales Tax Act. This is admitted by the answer of the State Board of Equalization, and no evidence thereon is necessary. [Tr. p. 12.] Under the pleadings it was entirely unnecessary to go into various items of sale. The testimony to which counsel for the State Board of Equalization refers was not denied, and the pleading admits Helms Bakeries has a permit as and is a retailer.

Referring further to the testimony, it will be seen on page 27 of the transcript that paragraphs I, III, IV, V and XII of the complaint were stipulated to be true. The employment of 489 men (not necessarily all selling foodstuffs) and gross sales amounting to millions being admitted, there is no evidence that the various persons who were not independent route operators were selling only food to the ultimate consumer. Furthermore, it is universally the law that a point which is not raised in the trial court may not be raised on appeal. This point that the showing of irreparable injury was lacking not having been an issue in the trial court, lack of detailed evidence thereon is consequently not properly considered by the District Court of Appeal.

Under the California Sales Tax Act a permit would be necessary to sell off the trucks owned by Helms Bakeries, of which there are at least presumably 200, which must be replaced from time to time [Tr. p. 39]. No mention is made of this in the opinion. There are, also, various other things to be worn out, such as used machinery, etc. On such sales there is a tax (*Bigsby v. Johnson, Treasurer*, 18 Cal. (2d) 860, decided October 28, 1941.) This bakery equipment of a value of $630,000 has to be replaced from time to time. Proof of this would have been put in

obviously had the respondent made any such point. It was actually made unnecessary by the stipulation [Tr. p. 51]. In the stipulation [Tr. p. 53] we read:

> "Defendants' only reason for claiming that Plaintiff is liable to pay additional sales tax is Defendants' contention that the Routemen referred to hereinabove were employees of Plaintiff, and, therefore, Plaintiff should pay a tax computed on the difference. * * * The only alleged taxes here in dispute between Plaintiff and Defendants are based on alleged sales of food products made prior to July 1st, 1935."

3. The Respondents Are in Error When They Contend That Petitioner Had a Plain, Speedy and Adequate Remedy at Law.

In this portion of their brief the respondents contend that the tax could be paid under protest and recovered by legal action. The respondents contend (Resp. Br. pp. 6-7):

> "The petitioner in the instant case was mailed notice of its denial of its petition for reassessment on December 8, 1939, and under Section 20 the assessment became final on January 7, 1940. Thus a payment could have been made and claim for refund filed on or before July 6, 1940, which was fifteen days after the complaint for an injunction was filed, and subsequent to the notice of hearing at the time of revocation."

The proved fact is that notice of re-assessment was January 14, 1938. [Complaint, Par. IX; Tr. p. 4.] Again such notice was sent on April 27, 1938, all of which was long after the repeal of the tax without a savings clause, and as to which the repealing statute specifically repealed

any right to assess after the expiration of the statute of limitations on penalties, and prior to the 1939 statute to which respondents refer. The argument of respondents, for this reason and numerous other reasons, is not tenable. The breath of life cannot be breathed into an expired right to collect a tax or to deposit and sue by subsequent change of a statute.

People v. Hochwender, 20 Cal. (2d) 181, referred to by respondent, is not in point in that the Bakery case is not within the statute. It was not a matter of an additional assessment. There never was any question of additional assessment. It goes back to the liability for the tax in the first place. In the *Hochwender* case an audit made in 1937 disclosed errors in the report as theretofore made, and consequently the Board of Equalization mailed a notice of additional assessment. In the instant case the original report was and is correct, and the section with respect to re-examination of the books and re-assessments and the attempt to collect a re-assessed amount so found to have been the result of intentional or unintentional misleading of the State Board of Equalization by a taxpayer, is not the point.

4. The Contention That the Board of Equalization Followed the Proper Statutory Proceeding Is Not in Point.

Petitioner contends in its petition for the writ and supporting brief that the statute of limitations had run on any right to forfeit the Retail Sales Tax Permit, and that the State Board of Equalization may not forfeit its permit until and unless it has been judicially determined that there is an indebtedness. We submit that under the case of *Laisne v. Cal. State Board of Optometry,* 19 Cal. (2d)

831, revocation requires an adjudication by the court. The State Board of Equalization is not given by the Constitution of the State of California any power to make any such determination. The statute of limitations assessing any penalty whether one year or three years, has expired, and the Board of Equalization is taking upon itself authority which belongs to a court. It is possible that machinery might have been set up in the State Board of Equalization permitting a hearing on such points, but neither the California Constitution or the Sales Tax Act sets up any such machinery, or grants any such right.

The case of *City of Chicago v. Kirkland*, 79 Fed. Rep. (2d) 963, cited by the Board, holds that the Mayor of Chicago could pass upon the facts of a violation of a Municipal Ordinance preliminary to review or legislative action. However, in the case before the Supreme Court here, the question is one of law, *i. e.*, whether the Constitution has given the Administrative Board judicial authority to hold a hearing, and if so, whether or not the time has lapsed in which to forfeit for the alleged violation. The *Kirkland* case does not discuss the constitutional or statutory authority under which the Mayor revoked the license. It holds (p. 966):

> "Thus it is clear that the only question legitimately before us is whether, in the present instance, the mayor acted upon evidence which would justify a finding of violation of the ordinances of Chicago by appellees. * * * *We may inquire only as to whether he acted arbitrarily.*" (Italics ours.)

The Board of Equalization obviously acted arbitrarily and the Bakery so contends.

5. The Findings of the Trial Court Are Effective.

One cannot stipulate to a matter or fail to put in evidence thereon without being bound by the trial court's decision.

> "He who consents to an act is not wronged thereby."
>
> *Cal. C. C.* 3515.

> "Acquiesence in error takes away the right of objecting to it."
>
> *Cal. C. C.* 3516.

Counsel for the Board goes outside the record to say (p. 10) that in its opening brief to the California District Court of Appeal the Board atacked each of the findings to which we refer. Such is not the case and the Appellate Court did not pass thereon.

6. The State Board of Equalization Is a Stautory Body and Its Rights With Respect to Collection of Taxes Are Given It by Statute. It Has Only Those Rights Given by Statute.

Counsel for the Board tries to make a point of the fact that Section 26 of the Retail Sales Tax Act "provides several other methods of collection, such as writ of execution issued upon an administrative 'judgment', warrant of distraint and seizure and sale". It allowed the Attorney General to "pursue any remedy hereunder * * *". This is immaterial. The remedy of collection by forfeiture is not given under Section 26. Hence, without legal adjudication of indebtedness, and after the statute of

limitations has run, revocation is not a remedy allowed to the Board.

Seaboard Acceptance, etc. v. Shay, as Sheriff, etc., 214 Cal. 361, 365-6;

Laisne v. State Board of Optometry, 19 Cal. (2d) 831, 834-5.

7. Section 16 of the Retail Sales Tax Act Is Unconstitutional.

The effect of the *Laisne* case referred to on page 12 of the respondents' brief, is that the revocation of the Bakery's Permit is not constitutional without court action. Reviewing that case, we see that the State Board of Optometry is given certain powers. The powers and duties of the Board are set forth in the Business and Professions Code. Thus, in Section 3024 the Code states:

> "The board may grant or refuse to grant certificates of registration as provided in this chapter and *may revoke or suspend the certificate of registration of any optometrist for any of the causes specified in this chapter.*
>
> "It shall have the power to administer oaths and to take testimony in the exercise of these functions." (Italics ours.)

Section 3025 (all the sections to which we refer are in the same chapter) of the code states:

> "The Board may make and promulgate rules and regulations governing procedure of the board, the admission of applicants for examination for certificates of registration as optometrists, and the practice of optometry."

Referring now to the Retail Sales Tax Act of 1933, which expresses the statutory powers of the Board of Equalization to revoke permits, we find only Section 16 of the Act which provides that if the holder fails to comply with any of the provisions of the Act (the statute does not say "If in the judgment of the Board the holder, etc.") or any of the rules and regulations by the Board prescribed or adopted under the Act, the Board may, upon ten days' notice in writing, hold a hearing requiring the holder to show cause why his permit should not be revoked, and may revoke or suspend the permit. Furthermore, under the *Laisne* decision—no constitutional judicial authority has been given to the Board. Its authority is merely ministerial, and has been exceeded. It cannot pass on disputed questions. The questions involved in the Helms Bakeries revocation were ones for judicial determination, and wholly outside any authority given to the Board of Equalization, whether or not the *Laisne* decision is taken into consideration.

Counsel for the respondents contends that (p. 13) "* * * petitioner had notice of the assessment of the tax and a hearing thereon, it had notice of the intention to revoke its license for nonpayment of the tax and a hearing on that question". Any such notice by one having no authority to so act is not notice at all, and of no value. For instance, should a Recorder's Court, or any other court than one of general jurisdiction, decide to proceed against and try a citizen for murder, any alleged process issued by it in connection wth such a matter entirely beyond its jurisdiction would not be due process, and it would not be necessary to pay any attention thereto. If it proceeded to enter a judgment of death and to put it into execution, then, of course, its action could and

would be reviewed, and would be found to be in excess of the power of such a court of limited jurisdiction. This illustration may not be the best possible, but shows the fallacy of the reasoning of the respondents.

Counsel for the respondents contends that the case of *Fidelity & Deposit Co. v. Tafoya,* 270 U. S. 434, is not pertinent. We contend that it is. It recites a broad principle, which is highly important. In that case the Corporation Commissioners of the State of New Mexico proposed to forfeit a charter in violation of constitutional rights granted under the United States Constitution. Their method of procedure was in accord with the New Mexico law. They were restrained. Mr. Justice Holmes stated in the opinion (page 43 of our brief):

> "Coming then to the merits we assume in favor of the defendants that the state has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result."

The State of California by proper procedure for cause may revoke permits, but may not use the forfeiture method in violation of constitutional rights. Unless the Supreme Court grants the writ of certiorari and reverses the District Court of Appeal of the State of California (whose decision the Supreme Court of California refused to review), the Board of Equalization of the State of California will, not only in the case of Helms Bakeries, but in nu-

merous other cases, use its so-called right of forfeiture "* * * as a part of a scheme to accomplish a forbidden result". (*Fidelity and Deposit Co. v. Tafoya, supra.*) Other states will follow the lead and the result will be government by threat, forfeiture of existence and arbitrary rule instead of a constitutional democracy.

Conclusion.

For the reasons stated, we respectfully request the United States Supreme Court to take jurisdiction, issue a writ of certiorari to the District Court of Appeal of the State of California, and after reviewing the decision, reverse the same—thus avoiding much further litigation and preserving the constitutional rights of millions of citizens who are by law required to have permits, and conduct the business on which they, their employees and many more rely, under the supervision of Administrative Boards.

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